

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

To be argued by:
Harold J. Boreanaz

**Docket
No.**

77-1351

In The
United States Court of Appeals
For the Second Circuit

B
PJS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

— v. —

WILLIAM J. MERINGOLA,

Defendant-Appellant.

On Appeal from The United States District Court for the
Western District of New York

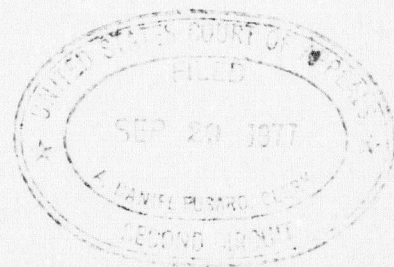
**BRIEF AND APPENDIX FOR APPELLANT,
William J. Meringola**

JOHN F. HUMANN, ESQ.
*Attorney for Appellant, William J.
Meringola*
Office and Post Office Address
736 Brisbane Building
Buffalo, New York 14203
(716) 854-5800

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1.

BRIEF FOR APPELLANT

STATEMENT OF THE CASE

On November 18th, 1975, the Federal Grand Jury filed a four count indictment, charging the Appellant with one count of conspiracy in violation of 18 United States Code 371, and three counts of causing theft, at three separate times, of goods in interstate commerce in violation of 18 United States Code 659 and 2.

The case was tried before the Hon. Harold T. Burke, United States District Judge for the Western District of New York, commencing on April 27th, 1977. On May 3rd, 1977, the jury found the Appellant guilty of all four counts.

This is an appeal from the verdict of conviction.

*Bracketed numbers preceded by an "A" refer to pages in Appendix. Otherwise the reference is to the original transcript.

STATEMENT OF FACTS

The case against the Appellant consisted essentially of the testimony of the three alleged accomplices: One of whom received immunity for his testimony [271, 272, 298, 311]; and the other two who were allowed to plead guilty to misdemeanor charges and were sentenced to conditional discharges [521, 526 and 697]. None of the evidence against the Appellant had any criminal meaning whatsoever, unless interpreted in light of the testimony of the alleged accomplices.

According to their testimony, the Appellant directed the accomplices to steal truckloads of Ragu Spaghetti Sauce and sugar and then aided the three witnesses in disposing of the stolen goods, in return for which, the participants received a portion of the proceeds.

Elwood Weber was involved in all three thefts. He testified that in exchange for his cooperation with both State and Federal authorities, only a misdemeanor charge was brought against him. [697-701]. As part of his arrangement, he had agreed to testify against the defendant.

"Q: So that in your mind, you were dealing to get yourself out of both difficulties?

A: Out of everything.

Q: The State and the Federal?

A: Right." [701].

On direct examination, Elwood Weber stated that Mr. Meringola

was involved in all three thefts. He testified that it was the Appellant who first suggested stealing a trailer, and that it was the Appellant who disposed of the goods at Norman Oretskin's warehouse [622].

On cross examination, Weber admitted that there were serious discrepancies between his courtroom testimony and his testimony in front of a Federal Grand Jury as to the events of March 1st. One crucial such difference involved the times asserted by the witness for the theft. At trial, Weber claimed that he and his brother took the truck at 2:30 a.m. and had arrived in Binghamton at 10:00 a.m. However, just seven months after the theft, in front of the Grand Jury, the witness stated that the theft occurred at 12:00 a.m., and that they had arrived in Binghamton at 8:00 a.m. [736]. Other uncontested evidence proved that Mr. Meringola was in Geneva at 8:00 o'clock on the morning of March 1st, and thus could not have been in Binghamton with the co-conspirators as the witness originally testified [854]. Weber also conceded that, before agreeing to testify, he had attempted to manufacture an alibi for himself by using a false logbook and phoney gas receipts [706].

Terry Weber's testimony concurred with that of his brother. He admitted his own participation in the crimes [297] and that he had been given immunity for his testimony [299].

Michael Lafferty was the third conspirator to testify against the Appellant. He admitted his participation in the third theft [491] and, while he did not concede that he received immunity from prosecution, Lafferty said he did not expect to be prosecuted and believed that by testifying he was helping himself [429]. Lafferty did plead guilty to a misdemeanor charge and got no jail time [521]. He also testified that he agreed to cooperate with the State Police by allowing himself to be fitted with a transmitter and to

engage in a conversation with the appellant [518]. The witness further admitted that he had attempted to blackmail the appellant, for a sum in excess of \$10,000.00 [520].

The cross examination revealed various conflicts between the August, 1975 Grand Jury testimony of the witness, and his statements in Court. For example, there were differences regarding the location of the arranged meeting with Mr. Meringola [588] and two different accounts of the circumstances surrounding how he and Elwood Weber entered the truck to examine the contents [553]. The witness attributed these discrepancies to his memory being fresher at trial after having conferred with the prosecutor about the event at issue. [554].

The appellant testified on his own behalf and offered the testimony of five character witnesses including a city councilman who was an ex-police officer [816] and a current member of the Ontario County Board of Assessors who was an ex-mayor of the City of Geneva [812]. The appellant testified that he was 51 years old and that he had a family consisting of a wife, two kids, and four grandchildren [838]. Prior to the incident for which he was standing trial he had never previously been arrested. He stated that he began having difficulties with the Government following his appearance as a defense witness in a Federal Trial in Buffalo in 1974 in which the Government lost the case [893-895].

The appellant disavowed any involvement with the three conspirators in their thefts. He denied being in Binghamton at all on March 1st, the day of the first theft [865]. The Government had introduced telephone toll records from the appellant's phone [Government Exhibit 13], which showed a series of calls from the Defendant's phone to the Binghamton area on the

morning of March 1st. Mr. Meringola stated that these were an attempt to locate and aid an alcoholic friend, Richard Marino [849-854].

The Appellant also denied that he was with Terry and Elwood Weber on the night of the second theft, March 15th, or on the following day. He testified that he was with his truck driver, Ray Knittle, from late at night on March 15th, until the night of the 16th, because the driver was having mechanical difficulties with his truck. This testimony was corroborated by Mr. Knittle, who stated that he was with the defendant, trying to fix the truck, during this time [946-949]. Mr. Meringola's presence in Binghamton on Saturday night, proven by phone and hotel records, was uncontroverted. The Government offered no rebuttal to the testimony of Mr. Knittle.

Mr. Meringola testified that he had no involvement with the third theft [887]. He stated that he had nothing to do with Michael Lafferty other than a conversation in April, and one in June [886].

The defense never contested the fact that the trucks were stolen.

POINT ONE

IMPROPER AND UNCALLED FOR REMARKS BY
THE TRIAL COURT IN ITS CHARGE TO THE
JURY CAUSED THE DEFENDANT TO SUFFER A
DENIAL OF HIS CONSTITUTIONAL RIGHTS
TO A FAIR TRIAL AND REPRESENTATION BY
COUNSEL IN VIOLATION OF THE FIFTH,
SIXTH AND FOURTEENTH AMENDMENTS TO THE
CONSTITUTION OF THE UNITED STATES.

A.

THE COURT CONDUCTED AN UNPROVOKED ATTACK
ON THE INTEGRITY OF DEFENSE COUNSEL'S
ARGUMENT TO THE JURY IN HIS SUMMATION
WHICH SERVED TO PREJUDICE THE JURY AGAINST
THE DEFENDANT.

Over the past several decades numerous Appellate Courts have been called upon to decide if and when a trial court's remarks aimed at a defense counsel have been so prejudicial so as to deny a defendant his basic right to a fair trial. Most of these cases deal with heated exchanges between the judge and defense counsel which have come about as a result of the pressures and demands of a lengthy trial. Most appeals deal with a lengthy record of such exchanges which have built-up throughout the trial.

This appeal does not present such an issue for review. The issue now before this Court deals with an unprovoked and unexpected attack on the integrity of defense counsel's argumentation to the jury in his summation, delivered without objection by Prosecutor, launched by the trial court in its charge to the jury. The prejudicial effect of the judge's remarks was enormous and denied the Appellant his right to a fair trial.

FACTS

The defense of the case was simple: the accomplices were falsely implicating the defendant so as to get themselves out of trouble; other witnesses whose testimony tended to implicate the defendant in the act of stealing the trucks were either mistaken or an intentionally distorting the facts; and lastly, the defendant, who testified at the trial, had nothing to hide and was telling the truth.

There were three separate and distinct areas where the trial Court chose to attack the integrity of defense counsel's argument to jury. Each will be dealt with separately.

1

As a matter of legitimate trial strategy defense counsel chose to attempt to simplify the issues before the jury. In his opening the defense conceded that there would be no controversy concerning the fact that the trucks were stolen [22, 23]. Counsel then went on to outline in some detail the facts as he knew them relating to the accomplices' connection with the thefts of the trucks. The prosecutor's summation took approximately 1 and 1/2 hours [1043]. Defense counsel argued to the jury that much of the proof offered by the prosecutor dealt with issues that were never really contested from the very beginning of the case [A 23]. The defense went on to argue that the prosecutor hoped to strengthen the weak areas of the case, namely the fact that the case depended on the testimony on the three accomplice witnesses, by putting in all kinds of extraneous papers, bills of lading, and proof going to the issue of whether or not the trucks were

stolen [A24]. There was no objection to this type of argumentation by the prosecutor.* It must also be pointed out that the prosecutor chose to rebut certain remarks of defense counsel and, to the extent he thought necessary, he did so [1097-1105]. Following the prosecutor's rebuttal argument the trial Court began its charge and chose to make the following comments:

"Counsel for the defendant in opening the case referred to the fact that the Government spent all this time in proving the theft of the shipments and the value of the shipments, and they devoted all this time wholly unnecessarily, because that was not in dispute.

The defendant in this case pleaded not guilty. That necessitated a trial. Now at that trial, the Government had the burden to establish the necessary elements of the case beyond a reasonable doubt, as I have already pointed out those elements to you.

The Government can use proof, or they can use a stipulation or agreement between the defendant and the Government. There was no such stipulation or agreement with the Government in this case as to the theft of these, or as to the value of the interstate shipments, or that they were, in fact, interstate shipments. The Government had to prove it. That wasn't an unnecessary gesture. It was caused by the fact that the defendant pleaded not guilty. Now there could have been a stipulation or an agreement between the Government and the defendant. There was none, so the Government had no alternative but to prove the theft, the interstate character, and the value of the shipment.

Now if the Government hadn't done that, in spite of the fact that the defendant had said those things were never in dispute, this Court would have been faced with a motion by the defendant that there wasn't the necessary proof in the case to establish the thefts or the interstate character

*The United States of America was represented by two assistant United States Attorneys assigned to the organized crime and racketeering section both of whom had a good deal of experience.

of them. So that business about this being an idle gesture to spend all this time of the proof, that is just not so." [A87 - 89] [emphasis added].

During the course of the trial the Government introduced the testimony of one Rudy Hektor to serve as corroborator of the accomplice's version of the theft of the sugar. Hektor was an employee of one Norman Oretskin, and claimed that he was present on the loading dock the morning that the stolen sugar arrived at Oretskin's warehouse. He testified that he unloaded the sugar and also gave a description of a man resembling the defendant as the driver of the stolen truck [139]. On cross examination it became apparent that the witness was not sure of the description that he gave the police and that in fact the description was based on a view of the back of someone's head [150].

At any rate, again as a matter of legitimate trial strategy, defense counsel chose to attack the credibility of Rudy Hektor in his closing comment to the jury [A31 - 34]. In connection with his questioning of Mr. Hektor's credibility defense counsel chose to comment briefly about Mr. Oretskin.

Mr. Oretskin had appeared with an attorney on the first day of trial and a conference was held in chambers outside the presence of the jury [A7]. The Court was advised that if asked any questions by the Government in reference to his role in the stolen shipments he would assert his Fifth

Amendment privilege and not testify. At the conclusion of the in-chambers conference, the Judge held as follows:

"I will resolve this very quickly. The attorney tells me now that he will take the Fifth Amendment, and in view of that statement, the Government is not going to call him. Now if Mr. Boreanaz asks me to charge the jury that there was a witness available and the Government didn't call him, and, therefore, the jury concluded that his testimony would have been unfavorable to the Government, I will decline to so charge." [A10-11].

At that point defense counsel was advised by the Government that there was no offer of immunity to the witness [A 11]. That was the extent of any instructions given to counsel at the in-conference chambers discussion concerning Mr. Oretskin.

Concerning the credibility of Hektor defense counsel made the following remarks in summation:

"Norman Oretskin, the owner of Polar Foods, and obviously the center of the disposition point with respect to at least the two loads that were, in fact, delivered, and you know not whether he has been charged, what he has been charged with, whether his case is disposed of or if he has a case. You know nothing about Norman Oretskin, yet you are asked to determine the credibility of his right-hand man, Rudy Hektor, without any motivation--Rudy Hektor, who is still employed by Norman Oretskin at this very moment, and you are asked to determine credibility in these issues when the Government falls flat on its face with respect to making what are sensible explanations for deficiencies in our case." [A34].

Once again without objection by the prosecutor and following the prosecutor's rebuttal, the trial Court made the following comments to the jury in its charge:

"The defendant made reference to his summation as I understood it to be, that Norman Oretskin was the only one that could have told you what happened at the warehouse on March 16th in Binghamton. During the course of this trial, I think he meant to infer that Oretskin wasn't called as a witness, and he wasn't called because the Government knew that his testimony would have been unfavorable. I wouldn't speak of this except for the fact that this is part of this case, and the defendant's attorney was part of it. In the early part of this case they came into my chambers, counsel for Oretskin and the Government and the defendant's counsel was also there. Now the Government at that time came in with the lawyer for Oretskin, and the lawyer announced to me, and counsel knew it, too--counsel for the defendant knew that if Oretskin was called as a witness, he would take the Fifth Amendment. And the Government was apprehensive that unless they called Oretskin as a witness, that the defendant might ask for an instruction that because the Government didn't call Oretskin as a witness, that Oretskin's testimony would have been unfavorable to the Government.

The defendant has a right to ask the Court to make certain charges. And I got such a request from the defendant [the request was that I charge that] it was solely within the prosecutor's power to call for this man Oretskin as a witness [and that] since the prosecution did not call this witness, you may presume the testimony would have been unfavorable to the prosecution. Now this [request] was in spite of the fact that I told counsel at that conference in chambers, along with the Government's attorney, and also the attorney for Oretskin, that I would not make such a charge to the jury in view of the fact of ~~those~~ happenings that I have pointed out. [A89, 90].*

In this portion of his charge the Judge deliberately went out of his way to attack the credibility and the integrity of the argumentation the defense counsel had made to the jury. In the first place, the Judge infers that defense counsel was arguing that only Oretskin could have told the jury what happened at the warehouse and that the Government did not call him because they knew his testimony would be unfavorable. Such an inference is unfair and inaccurate and isn't at all what the defense counsel

*The bracketed material was added to make clear the Court's comments.

represented to the jury. Based upon the interpretation of what defense counsel meant, the judge exposed to the jury the entire in-chambers proceeding regarding Oretskin and in so doing implied to the jury that defense counsel was not abiding by the rules.

(See point 3 of brief).

13.

3.

The trial judge had inferred that defense counsel was misleading the jury by arguing that the Prosecutor had spent too much time proving points that had already been conceded and that defense counsel was somehow twisting the rules and not abiding by the judge's orders when he commented on the credibility of Rudy Hector by mentioning his connection with Norman Oretskin. Now, the judge incorrectly blasted the defense attorney for certain comments he made in his summation concerning the taped conversation between the defendant and the accomplice/witness Lafferty.

The comments by defense counsel were proper, were not objected to by the Prosecutor, and were not commented upon in the Prosecutor's rebuttal. The existence of a tape recording of a conversation between the defendant and one of the accomplices was made known to the jury in the Prosecutor's opening:

"Mike Lafferty was approached by the State Police. He was charged. He decided to cooperate with the State Police. And the State Police asked him if he would wear a transmitting device and then talk with the defendant, William Maringola, and try to talk about those thefts, and he agreed.

And on June 6th, he had a conversation with the defendant, and he tried to talk to him about thefts, the three thefts I have just told you about, and also the State Police told him that if Maringola wanted to go out and get another truck that night or set up another theft to go along with him. And the State Police were at the other end of the transmitter recording the conversation.

In this trial we hoped to be able to pay that conversation for you." [18, 19]

This was the Prosecutor informing the jury about the existence of a tape containing conversations about the thefts in his opening. There can be no claim that this issue was introduced into the trial by the defendant. In response to the Prosecutor's remark, defense counsel made the following comments in his opening to the jury:

"On June 6th, Lafferty met with the defendant, equipped with the transmitting device, installed by State investigators who were in the vicinity with transcribing instruments and transcribing whatever this transmitter was transmitting with respect to the conversations that were occurring as between the defendant and Lafferty.

For more than one hour, Lafferty attempted to get the defendant to incriminate himself. Bear in mind that Lafferty knew that everything that was being said was being recorded. The defendant did not know. You will find that the defendant has a hearing difficulty and has had for many years, and Lafferty knew this, although he never told the police this. And he constantly tries to keep repeating things in a fashion so as to get the defendant to concede or to admit some involvement. You will find that the defendant says after being told, in essence, that he is going to be involved in this that other people are claiming that he is involved in this, that Lafferty is claiming that Weber has turned into a stool pigeon, and Weber is going to incriminate them all in order to save Weber's skin. You will find that the defendant says, 'They can do whatever they want. I didn't do nothing. I'm not guilty. I'm not running anyplace, and I'm not going any place.' [31, 32]

In the middle of the trial the Prosecutor apparently had some second thoughts as to the audibility and/or effectiveness of the tape and requested that the court listen to portions of the tape outside of the presence of the jury so as to determine whether it was or was not audible. Following the playing of a fifteen minute portion of the tape

the court ruled "for all practicable purposes the tape was inaudible" and that it would not be admitted into evidence [593]. There was no ruling that either counsel could not comment upon the tape or ask questions of the witness Lafferty concerning the tape. The understanding must have been the same amongst both counsel and the court, since on direct examination Lafferty testified as follows:

Q Now how long did you talk with him?

A Approximately an hour and a half, two hours.

Q And were your conversations recorded at that time?

A Yes, they were.

Q And later did you have a chance to hear these recordings?

A Yes, later on that day at the Police Barracks.

Q Were these recordings clear and audible?

A No. There was a lot of background noise, and you had to listen to it two or three time before you could even make anything out of it.

Q Are you able to recall what was said in that two hour conversation?

A Well, we talked a little bit about the theft, and Willie impressed on me the stand he was going to take and that he expected me to take the same stand, that we didn't know anything about it and leave Elwood holding the bag.

Q In other words, his idea was that you didn't know anything about it?

A Right

Q At any time during this conversation did he incriminate himself?

Objection sustained

Q Did you have any further conversations about these thefts?

A Later on in the conversation we talked about how stupid Elwood was because he didn't leave the tractor when he ran out of fuel and just leave it there and not monkey with it.

Q Were there any other conversations about these thefts?

A We were thinking about trying to get one out of New York City later on. [519, 520]

Q When you were being prepared and fitted with that receiver, did the State Police give you any instructions at that time?

A They told me to try to get Willie to talk about the theft and try to get him to set up another load to be stolen. [522]

On cross-examination Lafferty admitted that the taped conversation on June 6, 1975, was the last time he ever talked to Willie [595]. Further questions on cross-examination, without objection, were as follows:

Q When you were talking to him on June 6th, did he tell you while you were wired for sound, that he didn't know nothing about it?

A Yes

Q And he wasn't going to get in any trouble because he had nothing to hide?

A Yes

Q He told you that?

A Yes

Q You told him that you had received information that Weber was going to incriminate him?

A Yes

Q And he told you he didn't know what Weber would be incriminating him for because he didn't do nothing? Isn't that what he said?

A Yes

Q And you continued that conversation for an hour and twenty minutes?

A Yes. [596, 597]

The Prosecutor commented on the tape recording in his summation:

"As part of that cooperation, along with the State Police, he [Lafferty] put a transmitter on and arranged the conversation with Mr. Maringola. The conversation was taped, but as Mr. Lafferty said, it was very hard to hear. And he had to listen to it two or three times to make out the words. But he said in his testimony that they discussed what they would do on this thing, and Lafferty said that they would claim ignorance of all the facts."
[1031]

It is against this background of comments in the Prosecutor's opening, returned remarks in the defendant's opening, testimony by the witness concerning the tape, and remarks in the Prosecutor's summation, that defense counsel made the following comments in his summation. Concerning Michael Lafferty, defense counsel told the jury that Lafferty was a liar and that he was plotting to get himself out of trouble. Lafferty claimed that there was some sort of a plot to steal shrimp down in Baton Rouge, Louisiana, and that he claimed he called the defendant from Louisiana to set up the shrimp deal [1084, 1085]. Defense argued that the testimony concerning the shrimp deal was a fabrication and it was simply an attempt to set up a claimed connection with Maringola and the meeting of June 6th, the taping. The argumentation to the jury was as follows:

"Do you know why he called him? Well, he called him to establish some claim that he had some contact or connection with him.

What does he do then? He goes wired for sound on March 6th with the State Police, and I told you in the opening that we would show you that they failed -- he talked to him for over an hour, and they failed to incriminate the defendant in connection with that call, and the excuse was that the tape was noisy or something or another.

Well, we had an eighteen minute tape -- that is silent. Now we have a whole hour and twenty minute tape that goes noisy. And [if] in fact Lafferty was what he claimed he could be and could do, and what he claimed he could do was a very simple thing he to do, to run back and get an un-noisy tape or have him call on the telephone where they didn't have anything that was going to interfere with that. No, but what happened? Nothing happened.

Lafferty never was able at any time after June 6th to go back in contact with the defendant at all in any way, shape or manner. And curiously enough, when we brought in the defense Exhibit just to show you that sometime in July the State Police are out chasing the defendant and they are searching his premises or his property and nothing is taken under a warrant issued July 18th, 1975. And there was no explanation by anybody what was going on, who did this, why it was done, and why a month and a half after Elwood Weber and Terry Weber are arrested, they are still trying to find something to connect the defendant to them in some way, and they are failing. [A58, 59].

Once again, as with the other two occasions when the judge went out of his way to attack remarks of the defense attorney, there was no objection by the Prosecutor nor were there any comments offered by the Prosecutor in rebuttal.

It was against this background that the trial court once again took it upon itself to attack the credibility of defense counsel's presentation to the jury:

"Another reference was made to the fact that Lafferty had a body transmitter and had conversations. And there was some reference to the fact that there was no evidence of that tape in this case. That tape was played before me, and I was the one who determined that that tape was inaudible and was not understandable, and I would not permit it in evidence. That is the Court's responsibility, and that happened during the course of this trial, and incidentally, at that hearing the defendant's counsel himself also took the position that the tape was inaudible and not understandable." [A 91] [Emphasis Added]

As a result of these three pointed criticisms of defense counsel by the trial judge, a jury could not help but get the opinion that the trial judge thought very little of defense counsel's summation. As a result of the foregoing the jury was prejudiced against the defendant to the extent that it was no longer possible for him to receive the fair and impartial consideration that is his Constitutional Right.

ARGUMENTATION

There is no quarrel with the contention that there are occasions when the trial judge must control defense counsel by whatever means are called for. For example: To maintain court decorum and the dignity of the trial judge, to see to it that the court's rulings and orders are obeyed without unseemly or prolonged argumentation by counsel, to expedite the trial and keep it orderly, to protect witnesses from undue harassment, to keep out of the trial nonrelevant

or immaterial matter or to avoid repetitious objections. None of these occasions were the cause for the judge's remarks in the case now before the court.

Most of the clashes between the court and counsel come up during the course of a trial and in the "heat of battle". Such was not the case in this trial.

This is a case where the trial court went out of his way to cut the heart out of defense counsel's summation. The heart of a summation is the jury's belief that counsel for the defendant is proceeding in a proper fashion, is arguing within the boundaries of the rules, and is basing his argumentation upon proof which developed during the trial. For the trial court to give a single intimation that defense counsel is not dealing fairly with the jury, not to mention three separate accusations, one following the other, poisoned the jury to the extent that no curative instructions could repair the damage. It must be noted that in this case no curative instructions were given.

In order to insure that a criminal defendant receive a fair trial, the trial judge must maintain his impartiality, never giving the jury an impression of his feelings as to the accused's guilt or innocence. While the trial judge must be permitted considerable latitude in dealing with counsel, ruling on objections, and keeping the trial moving, he must not forget that the jury hangs on his every word and is most attentive to any indication of his view of the proceedings. U.S. v. James, 510 F.2d 546, 550 [CA5, 1975];

U.S. v. Ah Kee Eng, 241 F.2d 157, 160 [CA2, 1957]. The Eng Case was the typical kind of record that ordinarily comes before an Appellate Court for review. In that trial the court apparently gave repeated indications of impatience and displeasure that were of such a nature to indicate that the judge thought little of defense counsel's intelligence and of what he was doing and the court pointed out that such occurrences were most damaging to a fair presentation of the defense. The court went on to find that in this case the court had overstepped the proper bounds and, by what was said and implied before the jury, seriously prejudiced the defendant's case in the eyes of the jury. *Id* at 160.

Research into this area of the law had disclosed several factors which courts take into consideration with varying degrees of importance depending on the factual situation at hand. Several of these factors will be discussed under separate sub-topics.

1.

The main cause for reversal of convictions in this area is the belief of the Appellate Court that the trial court's remarks against defense attorney were of such a nature and delivered in such a fashion that the jury was prejudiced against the defendant. U.S. v. Coke, 339 F.2d 183, 185 [CA2, 1964]. One of the main considerations in this area is whether or not the jury was present when the remarks were made. If certain remarks were made in the heat of battle during the course of a long trial when it is possible that most of the jury missed the exchange,

or if the remarks were in chambers or at the side bar where the jury may have missed the exchange, the effect of such remarks naturally is deemed less prejudicial. However, in the case now before the court, the remarks were made during the court's charge to the jury when the eyes and ears of each of the twelve jurors were glued to each and every word uttered by the trial court. At this point in the trial there is little, if any, chance that the utterances of the trial court were missed by the jury. This is particularly so when not once, but on three separate occasions, the trial court chose to attack the integrity of defense counsel's argument. See for example, U.S. v. Weiss, 491 F.2d 460, 468 [CA2, 1974] where "many of the court's unfortunate comments quoted by Appellants occurred outside of the jury's presence and hence could not have influenced the jury." And U.S. v. Boatner, 478 F.2d 737, 741 [CA2, 1973] where the court pointed out that most of the exchanges between the trial court and defense counsel "fortunately, took place outside the presence or hearing of the jury".

In many of the cases in this area the trial court's attack is a personal one aimed at the defense counsel and his method of trying his case. In such cases the issue becomes whether the trial court's personal criticisms of counsel go toward the issue of the defendant's guilt or innocence. In the case now before the court the criticisms were not personal ones at defense counsel but rather they were aimed at defense counsel's argumentation to the jury in summation. By questioning the procedures and the underpinnings of counsel's arguments the trial court took away the effectiveness of such argument and in essence indicated

his disapproval of defense counsel's summation. As a result of the comments made in his charge the jury could not help but gain the impression that the trial court personally believed in the Appellant's guilt.

2.

A second factor considered by reviewing courts related to the first factor is whether or not the judge's remarks handicapped the defense attorney to a degree that the defendant's Sixth Amendment Right to assistance of counsel was abridged. This question usually comes about when the exchanges between the parties occur during the trial and there is an allegation that defense counsel has "trimmed his sails" and lost some of his ability to act as an advocate on behalf of his client. See U.S. v. Ah Kee Eng, Id, 166.

In the case now before the court there is no allegation that defense counsel "trimmed his sails". The trial court's remarks came in his charge and there was no reaction possible other than to request a mistrial, which action was taken [1135]. The effect of the court's remarks were to completely diffuse defense counsel's summation by inferring that counsel was being devious, deceitful, and unfair. In Gudger v. U.S., 314 F.2d 268 [App. D.C.] the court interrupted defense counsel's summation following certain comments defense counsel made concerning an undercover agent/witness. The court held that even if some of defense counsel's references probably justified intervention, reversal was required where the trial court's intervention was in terms which might have led the

jury to understand that the court considered counsel's entire argument on credibility of the undercover agent unjustified and improper, thus in effect removing this issue from the province of the jury.

The three areas where the court chose to attack defense counsel: (1) Comments about the strength of the Prosecution case, (2) comments about the credibility of Rudy Hector and the relationship of Norman Oretskin to Hector's credibility and (3) comments about the tape recording, were all proper areas of comment ^{by defense counsel} and presented questions of fact to be determined by the jury - not by the trial court. The trial court's remarks in these areas indicated its belief that the arguments had no substance and poisoned the effect of the entire summation. See U.S. v. Nazzaro, 472 F.2d 302, 311, 312 and 313 [CA2, 1973].

Any remarks by the trial court concerning the integrity of defense counsel or the honesty of its presentation of facts to the jury must be carefully scrutinized. In Allen v. U.S., 115 F. 3 [CA9, 1902] the court reversed where the trial judge indicated, in the hearing of the jury panel, that, from his personal knowledge, two affidavits [one of which had been executed by the defendant's lawyer] tended in support of a motion were false - the intimation that the lawyer was deficient in integrity was calculated to prejudice the defendant's case and it was reversed. In Lau Lee vs. U.S., 67 F.2d 156 [CA9, 1933] there was a reversal where the judge, after the defendant's attorney, in argument, had mildly exaggerated by asserting that there had not been a scintilla of evidence to prove that the defendant had signed an incriminating letter [there had been a small bit of unsatisfactory

evidence], exclaimed: "You misled the jury if any person ever attempted to mislead a jury, by stating that there was not a particle or iota of evidence to show Lau Lee wrote it". The court said that it was proper for the judge to correct counsel's inexact contention; but impugning his motive and honesty had not only discounted his entire argument but also cast suspicion on all the testimony he had introduced; and the court added that a conclusion of bad intent should never be announced except in findings on a formal charge of misconduct; and even then not in the hearing of the jury trying another person for a crime.

"Judicial comments in the presence of the jury are subject to special scrutiny because of the recognized fact that 'the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest words or intimation is received with deference, and may prove controlling'. Cautionary instructions do not cure a comment 'of a sort most likely to remain firmly lodged in the memory of the jury and to excite a prejudice that would preclude a fair and dispassionate consideration of the evidence'. Although in these instances the court was speaking of portions of the judge's instructions, the same principle must apply to the cumulative effect of a series of judicial remarks deprecating defense counsel and the defense case." U.S. v. Dellinger, 472 F.2d 340, 386 [CA7, 1972]

It is clear from the Dellinger Case that remarks made in the judge's charge have special weight with the jury. There is no claim now that the kind of acrimonious exchange between defense counsel and the court that went on in Dellinger took place in this case. What occurred in the case now before the court is more prejudicial to the defendant because of the fact that counsel and the trial court did not engage in heated exchanges during the trial. The remarks of the trial court were uncalled for, unexpected and devastating.

26.

3.

In evaluating the prejudicial effect of a trial court's criticism of defense counsel the Appellate Courts take into consideration whether defense counsel "got what he deserved". In other words, had he baited the trial judge or was the argument which provoked the criticism proper or improper. In this case the trial court and defense counsel got along famously. There was no forewarning that the court's charge would include the personal attack that occurred. In U.S. v. Coke, 339 F.2d 183, 185 [CA2, 1964] the court reversed the conviction on the grounds that the remarks of the trial judge directed at Appellant's counsel resulted in the denial of a fair trial and a deprivation of due process of law. In that case the court held that among the reasons for reversal were the fact that the remarks were given in the presence of the jury, that many of the comments of the trial judge do not appear from the record to have been at all justified, and that the effect of the judge's remarks undoubtedly gave the jury the impression that the defendant's case was of little substance and was not worthy of very much attention.

In the present case the judge chose to criticize defense counsel's argument to the jury in three areas. Defense counsel had a right and an obligation to argue these three areas and the Court's comments were uncalled for. The effect of this criticism was to undermine the entire summation.

4.

Some Appellate Courts, in deciding the issue, comment that the other proof in the case was extremely strong, and, so that if error

existed, it was harmless. That is not true in this case. None of the evidence in this case has any meaning without the testimony of the alleged accomplices. The accomplices had reason and motive to lie and numerous inconsistencies in their story were brought out in cross-examination. Defendant took the stand in his own behalf and denied implication in the crimes. The jury apparently had trouble deciding the case since they were out a period of seven and one-half hours which included a lunch and dinner [1133 & 1139]. In affirming a criminal conviction the court in U.S. v. Boatner, 478 F.2d 737, 742 [CA2, 1973] pointed out that "this was not a close case in which the verdict was tipped by the court's reactions to counsel". That consideration is inapplicable in this case.

5.

Boatner also mentions two other factors which take the sting out of the trial court's criticism of counsel, neither of which are applicable in this case: (1) The fact that the trial judge used strong, curative instructions to attempt to erase any ensuing prejudice to the defendant and (2) the court's annoyance at counsel was, if not equally directed at the Prosecutor, at least directed to a certain extent at the Prosecutor. In other words that the court's rulings and remarks were evenhandedly dealt out.

Neither of these two mitigating factors apply here. No curative instructions were given by the trial court since it would have been senseless. The complained of remarks were made in his

charge to the jury and curative instructions at that point would not have made any sense. As to evenhanded dealing with both counsel's summation there was not a single rebuke directed at the Prosecutor. Rather, the following exchange took place in the Prosecutor's rebuttal argument:

"We did a lot of talking about the credibility of the witnesses. How about the credibility of the defendant, William Meringola, and that Richard Marino story that he told? Where is there any corroboration for that?

Mr. Boreanaz: I object to that, your Honor. There is no duty to corroborate anything.

Mr. Baldwin: I am not saying there is a duty to corroborate. I'm simply going to point out it is available.

The Court: Objection is overruled. If counsel says anything that isn't backed up by the evidence, you disregard it and put it down to argument.

Mr. Baldwin: Where is there any corroboration for that story about the telephone calls at four o'clock? Richard Marino is dead. And Louis Cordi isn't here.

Mr. Boreanaz: I object to this. It is repetitive. He covered all of this in his first summation.

The Court: Objection is overruled. [1101]

Following his charge the Prosecutor asked the Government for an additional charge and "although the court already charged it, it agreed to charge it again" [A 97]. Defense counsel asked the court to instruct the jury "that the Government refused to grant immunity to Norman Oretskin and that they could have gotten his testimony, had they chosen to grant him immunity" [A100]. The court declined to so charge.

Defense counsel also requested the trial court to charge numbers 15, 16 and 17 of his written request and the judge again refused to charge [A101]. Appellant's request to charge is made a part of this Appendix and is marked page A3-6. (See Point 4 of brief.)

In affirming a conviction in U.S. v. Weiss, 491 F.2d 460, 469 [CA2, 1974] the court pointed out that "on the whole the trial judge, while openly displaying displeasure on some occasions, was relatively evenhanded. We cannot conclude from our thorough examination of the transcript any displayed partisanship amounting to prejudicial error, or that his heated outbursts were pervasive." That evenhanded nonpartisan atmosphere was not present in this trial.

One of the key factors in determining the extent of the prejudice is the timing of the remark. During a court's charge the jury is paying the utmost attention to every word uttered by the trial judge. A remark rebuking defense counsel or attacking the integrity of his argument is much more likely to have an effect on the jury at this point in the trial. See U.S. v. Dellinger, 472 F.2d 340, 386 [1972]; Starr v. U.S., 153 U.S. 614, 626 [1894]; and U.S. v. Scott, 257 F.2d 374, 376, 377 [CA7, 1958].

CONCLUSION

Following the court's charge defense counsel's position was made crystal clear:

Mr. Boreanaz: Your Honor, I would respectfully except to that portion of your Honor's charge wherein you advised the jury there had been a hearing in chambers with respect to the appearance of Norman Oretskin and that at that time counsel for the defendant had been advised that the witness would, in fact, exercise his Fifth Amendment privilege and that the court had instructed at that time that you would not charge that the witness was in the control of the Government. I agree that there was such a conference, so that there be no question about that. I believe that was on the record, and I agree that counsel was advised that the witness would exercise his Fifth Amendment privilege. I also believe, however, that the argument made by myself to the jury did not open the door to the disclosure of that circumstance, because I never charged the Government with an obligation to have called him, nor did I directly or indirectly infer that they had such an obligation. My argument was directed to the other witness that had appeared on behalf of the Government that was associated with Norman's Warehouse, and that being the witness who was the manager. And since counsel did not open the door in argument to the jury, in summation, to that aspect of the thing, I respectfully submit that it was very prejudicial to the defense to imply to the jury that counsel had made some devious position or taken a devious position in their presence.

Now, also I take the same position, your Honor, with respect to that portion of your Honor's charge which dealt with the audibility hearing. And I submit, your Honor, that once again you have put counsel in the position as to create the impression with the jury that counsel engaged in some devious posture. I agree I took the position that that tape, as it was produced here in court, was inaudible. I advised the jury in argumentation that they claimed it was inaudible. So while I was making my summation to the jury, I in no way opened the door to the comments that the Court made to the jury which, in effect, once again implied that counsel had take a devious position.

I submit that the argument that I made was proper. And I submit for the Court to then interject itself into the partisanship of the argument as between the defendant and the Government was done so in such a manner as to the great detriment of this defendant. And I submit that the damage is irreparable as far as we are concerned. So on behalf of the defendant on the ground that the Court has interjected itself with respect to these two issues in its charge to the jury, I respectfully move the declaration of a mistrial." [A 98, 99, 100]

The conviction should be reversed and a new trial ordered.

POINT TWO

TAKEN AS A WHOLE, THE COURT'S CHARGE EXHIBITED THE JUDGE AS A PARTISAN ON THE PART OF THE PROSECUTION AND PREJUDICED THE JURY TO SUCH AN EXTENT THAT THE APPELLANT WAS DENIED HIS RIGHT TO A FAIR TRIAL.

The court's charge consisted of twenty-seven pages in the transcript. In the first five pages [A 70 - 75] the court marshaled the evidence in such a fashion that it sounded more like a Prosecutor's summation than an impartial viewing of the trial. There was no mention in this marshaling of any of the numerous inconsistencies that were brought out on cross-examination nor of a defense witness, Mr. Ray Knittle, whose testimony conflicted with that of Terry and Elwood Weber, the two alleged accomplices. In the next ten pages of its charge the court dealt with an explanation of the elements and the terms mentioned in the indictment [1111 - 1122]. Following this portion of the charge the judge engaged in the remarks which formed the basis for Point One of the Brief [A 76 - 87]. In the last six pages of his charge the judge instructed the jury on

certain "boilerplate" instructions on the law.

Approximately two-thirds of the court's charge consisted of material, that taken in context, read like a Prosecutor's summation. The end result of this action was to make the judge a participant in the trial on the part of the Prosecutor and to remove from the jury the ability to fairly deal with the factual issues in the case. Because of this action the Appellant was denied his right to a fair trial.

POINT THREE

THE COURT COMMITTED REVERSIBLE ERROR WHEN IT DISCLOSED TO THE JURY, IN THE COURSE OF ITS CHARGE, THE FACT THAT ONE OF THE WITNESSES EXERCISED HIS FIFTH AMENDMENT PRIVILEGE AND REFUSED TO TESTIFY.

On the first day of trial the Government became aware that one of its witnesses, Norman Oretskin, was going to assert his Fifth Amendment privilege and refuse to testify. This situation was presented to the trial court in chambers [A7]. The Government advised the court they had no intention of granting immunity to the witness [A1]. The court informed counsel that if the defense requested a charge to the effect that a witness was available and the Government refused to call him and, therefore, the jury should conclude his testimony would be unfavorable to the Government, he would decline to so charge [A10,11].

Norman Oretskin's name was mentioned several times in the course of the trial. He was the owner of the food stores where the stolen goods were dropped and retailed. He was the employer of a Government witness, Rudy Hektor, who gave a description of a man who resembled the defendant at the scene of the crime. Hektor was the only non-accomplice witness to place someone who resembled the Defendant at the scene of the crime and was the subject of extensive cross-examination and comment in summation.

It is a rule of law that privileged refusals to testify cannot give rise to any inferences, for either side, no matter how

logical. In U.S. v. Maloney, 262 F.2d 535 [CA2, 1959] it was held to be reversible error for the Government to place on the stand witnesses whom it knew would refuse to testify behind their Fifth Amendment privilege. Since the jury's logical inference would be prejudicial to a defendant, the Prosecution was responsible for keeping the jury unaware of the action of the witnesses. The court also found it significant that the trial judge failed to issue curative instructions.

In the case now before the court the Prosecutor correctly kept knowledge of Oretskin's exercising his Fifth Amendment privilege from the jury. It was the court in its charge, not the Prosecutor, who presented this situation to the jury [A89,90]. Apparently the judge felt that defense counsel had opened the door to his comments by counsel's remarks in his summation [A89]. That feeling of the judge was unwarranted, unjustified, and not supported by the transcript. The court informed the jury as follows:

"During the course of this trial, I think he [meaning defense counsel] meant to infer that Oretskin wasn't called as a witness, and he wasn't called because the Government knew that his testimony would have been unfavorable."
[A89]

The court then went on to disclose the in chambers discussion to the jury. In Namet v. U.S., 373 U.S. 179 [1963] the court held that for error, in this area, to be reversible, there must be a showing of prosecutorial misconduct in the calling of the witness or the inference drawn by the jury from their refusal to testify must be found to add a critical weight to the Prosecution's case in a form not subject to

cross-examination. By critical weight the court apparently was referring to an inference essential to the case.

Here, there is no allegation of prosecutorial misconduct. Neither is there a concession that defense counsel opened the door. The trial court took it upon itself to inform the jury concerning the witness taking his Fifth Amendment in such a way that it appeared as if defense counsel was misleading them. Coming from the judge and in the form of a rebuke to defense counsel could very possibly lead the jury to an inference that the witness would give testimony harmful to the defendant's position. It was obvious that the owner of the food chain, Oretskin, dealt with someone concerning the stolen goods. His workman, Rudy Hektor, had given a description of an individual that fit the defendant as being present when the trucks were unloaded. The credibility and motivation behind Hektor's testimony was of critical importance to the trial. The court's comments to the jury in this area were highly prejudicial and added weight to the credibility of Hektor which was not part of the trial transcript and not subject to cross-examination.

If the court simply misconstrued defense counsel's comments in summation that mistake should not take away from the strength of the argument. As was pointed out in a dissent to U.S. v. Leviton, 193 F.2d 848 [CA2, 1951]:

"Since the judge's indiscretion may well have induced a verdict against the defendants, it will not do, I think, to say that we will ignore the incident because the judge was only human. Of course, all judges are human, and therefore make mistakes. But as the mistake of the judge in this case may easily have harmed the defendants seriously, we should correct it by directing a new trial. We should be humane as well

as human. And since the defendants are languishing in jail and the trial judge is not, they should be the object of our humaneness."

POINT FOURREVERSIBLE ERROR IN THE COURT'S RULINGS
ON DEFENSE COUNSEL'S REQUESTS TO CHARGE.

Prior to summation and charge defense counsel submitted written "requests to charge" to the trial court [A100]. The court made rulings as to which requests it would include and those it would not include in its charge [A101]. Although defense counsel attempted to clear the record on that point [A101], the court stated that it had ruled on the requests and that the rulings were in the record in the form of marks the trial court made on the written requests submitted by counsel [A101].

Rule 30 of the Federal Rules of Criminal Procedure entitled "instructions" [A104] states that upon submission of written requests to charge to the trial court, the court shall inform counsel of its proposed action upon the requests prior to the arguments to the jury. The purpose of the rule is so that counsel on both sides may frame their summations with reference to the charge and to allow counsel to argue the case to the jury intelligently. U.S. v. Mendoza, [CA Tex., 1973] 473 F.2d 697; U.S. v. Bass, [CA Ill. 1970] 425 F.2d 161; U.S. v. Tourine, [CA N.Y., 1970] 428 F.2d 865.

Defense counsel relied heavily in his summation on the ruling of the judge that the court would charge that witnesses may be discredited or impeached by showing that they made prior inconsistent statements [A47-53]. For example:

"Now I want to take the Webers and Lafferty and put them all together and comment on them. As to their credibility, what is there track record?..."

Well, I point out the inconsistencies that occurred, for example, in some of the Grand Jury testimony, and the Prosecutor has the audacity to stand here and make an argument to you, 'well, you know, they had more time to think about it now, so what they say now is more accurate than what they said then. They had all these months to think about it.' If they couldn't get their story straight over all those months, then they will never get their story straight. And the reason they can't get their story straight is because they are lying about the defendants involved in it....

Now what occurred here is that there was proof before the Grand Jury, for example, that the Ragu load was delivered nine or ten o'clock in the morning. That is what Elwood Weber, the only person that testified before the Grand Jury, said then, after months of an opportunity to think about it. Now all of a sudden he comes in here, and there is two things that allow him to change his mind...." [A47-52]

Number 16 of defense counsel's requests to charge was as follows:

"The testimony of a witness may be discredited or impeached by showing that he previously made statements which are inconsistent with his present testimony. The earlier contradictory statements are admissible to impeach the credibility of the witness, and not to establish the truth of these statements...." [A5]

Nowhere in his charge did the court instruct the jury as requested in spite of the fact that he ruled that he would so instruct them. Following his charge, defense counsel's specifically took exception to the court's lack of instruction in this area [A10] but the court refused to correct the error [A11].

The court's are quick to point out that a defendant is not entitled to a perfect trial but only a fair one. The bottom line in any appeal is whether or not a complained of error effected the jury in such a manner as to incorrectly influence their decision on the merits. The court's lack of instruction in this area had such an effect upon this jury.

Following two or three hours of deliberation the judge received the following request from the jury:

"May we please have the testimony of the grand jury of Elwood Weber and Michael Lafferty" [A101]. The judge informed counsel that he intended to simply tell the jury that the requested information was not in evidence[A102]. At this point defense counsel once again renewed his request that the judge inform the jury as to the purpose of cross-examination based upon prior testimony and how the jury could properly consider and evaluate the witness's responses to the questions:

"I submit under the circumstances that the court should make an effort to respond to what is an obvious attempt by the jury to determine how to evaluate the usage of the prior inconsistent testimony, if any, that they may find with respect to the credibility of these witnesses. So I request that the court return the jury to the courtroom and advise them that counsel was entitled to use the prior sworn testimony of these witnesses for the purpose of impeachment, and although the exhibits themselves were not permitted into evidence, they may use such prior inconsistencies as they find to exist from the testimony as elicited in evaluating the credibility of these witnesses.

THE COURT: I decline to do so." [A102].

In response to counsel's Rule 30 Request the court had ruled that it would charge that prior inconsistent statements could be used

for the impeachment of witnesses to discredit their testimony; the credibility of the witnesses was the key issue in the case; counsel framed a significant portion of his summation based on the court's ruling as to what it would charge in this area; the court did not charge as it had indicated it would and when it was specifically pointed out that the charge had not been delivered the court refused to repair its error; finally, it is clear from the jury's request that they were vitally interested in the credibility of the witnesses and were groping for ways to evaluate their testimony; once again the court refused to instruct them in an area where it should have been clear they needed further instruction.

The "bottom line" is that the Appellant was denied his right to have the jury impartially determine the evidence presented based on proper, essential instructions.

CONCLUSION

All Four Points presented to this court for review are based upon the trial court's actions or inactions in its charge to the jury. It is beyond question that the contents of the court's charge is of critical importance to an Appellant particularly in a criminal case. By attacking the credibility of counsel's argument to the jury, by marshaling the evidence in such a way as to indicate his personal opinion toward the case, by informing the jury that a witness had taken the Fifth Amendment in chambers, by misleading defense counsel as to what the court would charge the jury, and, finally by

not instructing the jury on a critical point in the face of a clear request from them, the trial court prevented the defendant from receiving a fair trial in violation of due process of law and also prevented him from receiving effective counsel in violation of the Sixth Amendment.

Respectfully submitted,

JOHN F. HUMANN
Attorney for Appellant
WILLIAM J. MERINGOLA
Office & P. O. Address
736 Brisbane Building
Buffalo, New York 14203

APPENDIX.

RELEVANT DOCKET ENTRIES.

RELEVANT DOCKET ENTRIES

11/18/75 Fld. Indm.; mtn. by Govt. for bench warrants.
Granted. Warrant Issued.

12/5/75 Case transferred to Judge Burke, Rochester (see
letter dated 12/5/75 from the U.S. Atty., to
J. Elfvin in file)

4/6/76 Filed Govt's answer to deft Meringola's motions.

4/12/76 Filed deft's motion for discovery, etc., ret. at
Roch. 4/12/76 (filed and retained in Rochester)

6/14/76 Filed Order - re deft's motions for discovery &
Inspection and for a bill of particulars - Govt.
to furnish deft. Brady material, etc., on or
before 6/25/76; motions for discovery & inspection
and for a bill of particulars is denied -- BURKE, J.

4/26/77 Case is moved ready for trial. Jury is duly
impaneled. Witnesses sworn in. Trial is adj.
until tomorrow.

4/27/77 Court opens pursuant to adjournment. Trial con-
tinues from yesterday with the same appearances.
Witnesses. Trial is adj. until tomorrow.

4/28/77 Court opens pursuant to adjournment. Trial con-
tinues fr yesterday with same appearances. Outside
the presence of the jury, portions of tape are
played. Court finds the tape is inaudible and it
will not be played for the jury. Witnesses. Trial
is adj. until tomorrow.

4/29/77 Court opens pursuant to adjournment. Trial con-
tinues fr yesterday with same appearances. The
Govt. rests. The jury is excused until Monday.
The deft. moves for a judgment of acquittal. Denied.
Trial is adj. until Monday.

RELEVANT DOCKET ENTRIES.

- 5/2/77 Court opens pursuant to adjournment. Trial continues fr yesterday with same appearances. Witnesses. The deft. rests. The evidence is closed. Trial is adj. until tomorrow.
- 5/3/77 Court opens pursuant to adjournment. Trial continues fr yesterday with the same appearances. Mr. Baldwin sums up for the Govt. Mr. Boreanaz sums up for the deft. Mr. Baldwin sums up in rebuttal for the Govt. After listening to a charge by His Honor, the jury retires in the custody of two sworn officers of the Court. Jury returns to deliberate upon their verdict. Outside the presence of the jury the deft. moves for a mistrial. Denied. Jury returns for further instructions. Jury retires; returns to continue deliberations. Jury returns with the following verdict:
- Count I - Guilty
Count 2 - Guilty
Count 3 - Guilty
Count 4 - Guilty
- Jury polled at request of deft. Jury discharged. Sentence is deferred until May 23, 1977. The Govt. moves to have the deft. remanded to custody. Motion denied.
- 6/13/77 On motion of Dept. of Justice Atty. Gregory Baldwin, Deft. is sentenced as follows: The Court: I impose a sentence of three years on each of four counts of a four count indictment. The sentences are to be served concurrently.
- The deft. requests bail pending appeal. The Govt. opposes. Bail is continued pending appeal. Notice of appeal filed in open court.
- 6/16/77 Copy of notice of appeal, form A and copy of docket entries mailed to OCA.
- 6/17/77 Filed Judgement and commitment. Commitment issued.

APPELLANT'S REQUESTS TO CHARGE.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-vs-

CR 75-254

WILLIAM J. MERINGOLA

REQUESTS TO CHARGE

- Yes 1. The interstate character of the property stolen is an essential element of each of the offenses in this indictment.
- Yes 2. Interstate commerce involves movement across state boundary lines.
- Yes 3. The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. Their burden never shifts to the defendant. The law never imposes upon a defendant any requirements of calling any witnesses or producing any evidence.
- NO 4. It was solely within the prosecutor's power to call NORMAN ORETSKIN as a witness. Since the prosecution did not call this witness, you may presume that his testimony would have been unfavorable to the prosecution.
- Yes 5. There has been testimony offered that the defendant's reputation for truth and veracity is good. You should consider such evidence along with all the other evidence in this case.

APPELLANT'S REQUESTS TO CHARGE.

6. Evidence of the defendant's reputation, inconsistent with those traits of character ordinarily involved in the commission of the crime charged may give rise to a reasonable doubt, since you may think it improbable that a person of good character in respect to those traits would commit such a crime. Character testimony alone may create a reasonable doubt, although without it the other evidence would be convincing of guilt.

7. A reasonable doubt exists whenever, after careful and impartial consideration of all the evidence in the case, the jurors do not feel convinced to a moral certainty that the defendant is guilty.

8. If the jury views the evidence in the case as reasonably permitting either the conclusions of guilt or innocence, then the defendant is entitled to a verdict of not guilty.

9. If you find that the prosecution has offered weaker and less satisfactory evidence when stronger and more satisfactory evidence could have been produced then you may view the evidence offered with suspicion.

10. You should view the testimony of ELWOOD WEBER, TERRY WEBER and MICHAEL LAFFERTY, with suspicion. You should scrutinize their testimony with great care and be reluctant to convict upon the word of these witnesses alone.

11. The character of any shipments in commerce may be determined by the shipping documents or shipping bill. Such documents shall be prima facie evidence of the place from which and to which such shipment was made or about to be made.

APPELLANT'S REQUESTS TO CHARGE.

X 92-
12. "Prima facie evidence" means sufficient evidence to establish the fact unless outweighed by other evidence. In other words, shipping documents, if proved, are sufficient to show either the interstate character or lack thereof of the shipment in the absence of other credible evidence to the contrary.

Y 92-
13. A witness may be discredited or impeached by evidence that the general reputation of the witness for truth and veracity is bad in the community where the witness now resides, or has recently resided.

Y 92-
14. If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

Y 92-
15. The testimony of a witness may be discredited or impeached by showing that the witness has been convicted of a crime. Prior conviction does not render a witness incompetent to testify, but is a circumstance which you may consider in determining the credibility of the witness. It is the province of the jury to determine the weight to be given to any prior conviction as impeachment.

Y 92-
16. The testimony of a witness may be discredited or impeached by showing that he previously made statements which are inconsistent with his present testimony. The earlier contradictory statements are admissible to impeach the credibility of the witness, and not to establish the truth of these statements. It is the province of the jury to determine the credibility, if any, to be given the testimony of a witness who has been impeached.

APPELLANT'S REQUESTS TO CHARGE.

Y 92
17. If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars; and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

DATED: May 2, 1977

Respectfully submitted,

HAROLD J. BOREANAZ
Attorney for Defendant
Office & P.O. Address
736 Brisbane Building
Buffalo, New York 14203

CONFERENCE - RE: NORMAN ORETSKIN.

* * * * *

Rochester, New York

Tuesday, April 26, 1977

2:00 p.m.

- - -
(In the robing room.)

MR. BALDWIN: May the record reflect that present here is myself, Dennis O'Keefe, Harold Boreanaz and Mr. Dick Aswad. Mr. Aswad represents a witness who's under subpoena by the Government, Your Honor, in the case at hand, United States versus William Meringola. He has been subpoenaed as a Government witness. Mr. Aswad is Mr. Oretskin's attorney. The witness' name is Norman Oretskin, and Mr. Aswad has advised me that it is Mr. Oretskin's intention to assert his Fifth Amendment privilege to questions which would be asked by the Government in reference to his role, of any evidence that he could give in the matter of the trial at hand. And that being the situation, Your Honor, we are loathe to release Mr.

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Oretskin from the subpoena, and at the same time we feel --

THE COURT: I can state the problem very quickly. They are apprehensive that if they don't call the witness, that you, Mr. Boreanaz, will say that there was a witness available, and he wasn't called, and, therefore, the jury can assume that his testimony would have been unfavorable to the Government's case. Now that is their apprehension, and that is the purpose of this meeting.

MR. BOREANAZ: Is your representation on the record as his attorney that he will exercise his Fifth Amendment privilege to all questions put to him?

THE COURT: He would give his name.

MR. ASWAD: He would give his name and his address, but I think that would be all.

THE COURT: Anything beyond that he would take the Fifth Amendment?

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MR. ASWAD: That's correct.

MR. BOREANAZ: It is my understanding, Judge, that he has already pleaded guilty to something in connection with this matter.

MR. O'KEEFE: I believe that is wrong, Your Honor. I believe he pleaded guilty to another charge.

THE COURT: To another charge?

MR. O'KEEFE: Right, not related to this case.

MR. BOREANAZ: Was there not a charge pending against him in connection with this case?

MR. ASWAD: Yes.

MR. BOREANAZ: Is that still pending?

MR. ASWAD: They were dismissed.

THE COURT: What is that?

MR. ASWAD: They were dismissed.

MR. BOREANAZ: The charge against him was dismissed?

MR. ASWAD: Yes.

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MR. BOREANAZ: When did that occur?

MR. ASWAD: Several days ago.

MR. BOREANAZ: Was that a part of the plea disposition?

MR. ASWAD: It was not. I don't really know what --

THE COURT: Was that charged in this court?

MR. ASWAD: No, Your Honor. These were in New York State courts. They have nothing to do with this Federal liability, under Federal statutes.

And that would be the basis on which I would --

MR. BOREANAZ: The Government has provided me with at least one statement which your client signed, apparently. Is there more that he signed?

MR. ASWAD: I don't know, and --

THE COURT: I will resolve this very quickly. The attorney tells me now that he will take the Fifth Amendment, and

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in view of that statement, the Government is not going to call him. Now if Mr. Boreanaz asks me to charge the jury that there was a witness available and the Government didn't call him, and, therefore, the jury concluded that his testimony would have been unfavorable to the Government, I will decline to so charge.

MR. BOREANAZ: I gather, Your Honor, there has been no offer of immunity by the Federal Government to the witness?

MR. BALDWIN: No, there has not.

MR. BOREANAZ: Nor is there any intention to grant him immunity?

MR. BALDWIN: No, sir.

MR. BOREANAZ: I have at least in my possession provided to me by the Government what appears to be a statement signed by the witness, which I believe is exculpatory of the defendant. I would reserve my right at some other time to offer that.

THE COURT: We will deal with

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that at another time.

When did you get that statement from the Government?

MR. BOREANAZ: Just this morning.

THE COURT: You say it is exculpatory, and the Government has furnished you with it?

MR. BOREANAZ: I believe so, Your Honor. The reason I made the other inquiry is I should be entitled to it if this witness, who is taking the Fifth, made any other such statement. I don't know whether he did or not. That is all I was seeking to find out.

THE COURT: Has he, as far as you know?

MR. BALDWIN: No, Your Honor. As far as I know, he made one statement, and that is the statement that was turned over to Mr. Boreanaz.

MR. BOREANAZ: I am satisfied with that statement on the record.

MR. ASWAD: Where does that

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leave me with my client?

THE COURT: He is still under call. He is not released from the subpoena, and I can tell you it would be unlikely that they would call him. I can't conceive of any circumstance which would lead them to call him, but I am not going to release him from the subpoena at the present time.

MR. ASWAD: Thank you, Your Honor.

* * * * *

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view and consider all the testimony and the evidence in this case, you will come to the same conclusion and you will find that the defendant, William Meringola, is guilty as charged on each of the four Counts in this Indictment.

Thank you.

MR. BOREANA2: May it please Your Honor, Mr. Baldwin, Mr. O'Keefe and ladies and gentlemen of the jury. You have just heard approximately an hour and a half, not counting the interruption for the fire drill, of an impassioned plea of the prosecutor in which he seeks to urge you to convict my client. I in no way criticize him for that plea. I ask you, however, to ask yourselves this question: Was he plea not overdone? Did he not stretch a point, and was it not, the argument put to you, nothing more than a glib attempt to cover up all of the deficiencies in the Government's case?

I pose that question to you at the outset, and as I commence to speak to you, I have no intention of talking an hour and a half as the prosecutor did, and maybe I can make it an hour, or hopefully a little less.

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I want to thank you all first. You have been a very kind, patient and attentive jury. I'm sure that as your task draws to a close, you will approach your duty with the same sensible attitude that you have displayed throughout the course of the trial. Cases are not decided on impassioned pleas by either side. Cases are decided on the strength or weakness of the proof involved in a case. And cases in court are decided on the basis of the jury's belief of the testimony presented and then applying to that what you believe to be true the rules of law as Your Honor will give them to you.

I have no intention of impinging upon the Court's function of giving you the rules, because it is the Judge's obligation to provide you with the rules that you must apply. And it is your obligation to follow those rules. I shall touch very briefly upon some of those rules simply for the purpose of putting my argumentation into prospective and for no other purpose. And if in any way I cite to you a rule that does not foursquare with what Judge Burke tells you, then totally disregard what I have to say, because the rules will come exclusively and solely

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from him.

If I were to hold up a glass here -- I see Mr. Baldwin left his glass behind -- but if this glass were filled to the half-way point, we could look at it and say -- one of us might say, "It is half empty," and the other might say, "It is half full." And we can both be right. As a matter of fact, we would both be exactly right. And I have heard it said that the optimist says, "It is half full." And the pessimist says, "It is half empty." And the point of the remark that I make is simply to bring forth to you the idea that the point of view that one has often determines what one sees.

Now, of course, what you have heard from the prosecutor comes from the prosecutor's point of view, and that is trying to urge you to convict. And he has done a good deal of work in this case, and he is here to argue to the best of his ability the Government's case.

But your point of view is a little different. Your point of view, as you start off, doesn't presume that the Government's case is correct at all, as his arguing point of view did. Your point of view is to

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the effect that a defendant is presumed to be innocent. The fact that the defendant has been indicted is in no way evidence that he did anything. It is simply a means by which an accusation is brought against him or any other citizen.

The presumption of innocence with which our law cloaks the defendant lasts throughout the course of the trial. And it lasts until such time as you, if you so determine, that his guilt has been proven beyond all reasonable doubt. And so I say to you now as we stand here and as you commence your deliberations, your point of view should be that which tells you in your own mind that the defendant is presumed to be innocent. All right, starting with that presumption, where else must you go? Well, the defendant is never obliged to prove his innocence. The prosecutor is at all times obliged to prove his guilt. That obligation on the part of the prosecutor is such that he must prove the defendant guilty beyond a reasonable doubt. The burden of proving that guilt beyond a reasonable doubt never shifts. It always remains with the prosecutor. Those are the rules as I understand them and as I believe Judge Burke will

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give them to you. So I believe that it serves no purpose to engage in an impassioned plea to get you to decide the case one way or another.

I simply suggest to you that it serves a useful purpose, however, to start with the correct prospective and then to logically, coolly and analytically analyze the proof and with the thought in mind always, "Has the Government met its burden of proving the defendant guilty beyond all reasonable doubt?"

I suppose the words "reasonable doubt" deserve just a little bit of comment, and I am not going to get into anything extreme in connection with that. Perhaps the best way of thinking about a reasonable doubt is something that might cause you to pause or hesitate as a reasonable person.

In the event that you had to make a decision of a very important nature on behalf of yourself and in your own life, and let's assume that you had to pick up your family, sell your home and move to the West Coast and start a whole new life. You would want to know a number of things before you did that. You would want to have some information at your disposal. You would want to be persuaded beyond a

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reasonable doubt that what you were doing was the right thing for you and your family.

Now I think if you take that kind of attitude and apply it to what you are going to have to do here as jurors in a criminal case, you might get some prospective with respect to what this idea of reasonable doubt is. Clearly, a reasonable doubt is not any doubt. It is not a hypothetical doubt. It is not a whim. It is not a fancy. But it is a reason to doubt, a reason to pause, a reason to hesitate with respect to whether or not the Government has proven the guilt of the defendant. Do you have such reason or reasons in this case? Now you needn't all have the same reason. That is why we have twelve people on a jury. What might lend itself to one person for their being a reasonable basis for a doubt might not for another, and vice versa. So the law requires that the prosecutor prove to the satisfaction of all twelve of you, bearing in mind that you have literally hundreds of years living experience, sitting in a jury box, and you don't leave your common sense home with you when you come to sit as jurors. You apply reasonable standards. You apply

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the same means and the same methods that you use in your ordinary everyday life in terms of deciding the issues that you have to determine.

Well, what is the critical or key issue that you have to determine. It seems as though the principal issue is the credibility of the witnesses. You will find that this is your sole responsibility, that no one in this courtroom has the prerogative of deciding the credibility of the witnesses except you. The prosecutor doesn't decide, and I don't decide, and even His Honor, Judge Burke, doesn't decide what the witnesses said and as to whether they testified truthfully or falsely. That is solely the prerogative of jurors. So you will have to determine, if you can, whether or not you are going to believe certain of the testimony that you heard.

Now how do you do this? Well, I have suggested to you already that you use the same methods that you use in everyday life. When you meet a person or have to decide whether what a person is saying is true or false, you sort of size that person up. You look at the way they talk, what they have to say and whether it is consistent today with what they said on prior

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occasions, their manner, their demeanor, whether they are evasive when you question them, or whether they are forthright and candid in respect to answers that they give to you if you were to question them. You look at what their track record in life is. All of these are the factors that you bring to bear and many more that will come to your own minds, and some of which perhaps His Honor will suggest to you. But the ranges are open for you to determine as to what factors you think relevant as bearing upon the issue of the credibility of any respective given witness at any time.

Now you take all of that living experience that you have and you apply it to the fact-finding process that you find yourself in pursuit of. You start off with the basic proposition that the defendant is presumed innocent and that the prosecutor is obliged at all times to prove his guilt beyond a reasonable doubt. You will find some other little rules. There will be certain elements, for example, to each of these crimes that are alleged in this indictment, and you will find that the prosecutor has to prove each of those elements, each beyond a

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reasonable doubt. But I touch not upon those except to mention generally that you will have to pay close attention to His Honor's instructions in these regards.

With that kind of a prelude to what your function is and how I believe you should approach it, perhaps a cool, dispassionate look at not selected excerpts, not just those portions of the proof that the prosecutor chose to allude to in his summation to you, and perhaps we might take an attempt to analyze the prosecutor's case.

Before I do that, I would like to point this out to you. You will recall that at the opening, we said that this was sort of like the table of contents of a book, and it would give you some idea where the issues were, what issues were in contest, and what issues were not. You may very well recall, and I hope you do, that we conceded quite clearly that these shipments had been stolen. We conceded quite clearly that the Webers were involved in it and so was Lafferty. There was never any question about any of that. We said that there was a question about whether the defendant was involved in it and that the Government's case would be supported by the

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testimony of these people that we told you had serious motive to lie. But on the outer perimeters of what has occurred here, and that being whether Pagu was stolen on a certain date or whether it was shipped from here to here, or whether the bills of lading said this or that, or whether it wound up in Norman Oretskin's warehouse, and you will recall that I pointed out to you in opening that this trooper had gone and gotten a search warrant, and he seized this merchandise down there. And I told you how he got the search warrant. And I told you where the search warrant was issued and what judge did it, and all of that. So I think it is appropriate, at least at this point, to comment to you that the Government spent an entire week putting in proof here, and a good deal of it dealt with issues that were never in contest at all from the very beginning. They were conceded by the defense. I wonder what impression it leaves upon you when you think about it logically and say, "Boy, they really overtried their case on the prosecution side. Why did they waste so much time proving all of these things that there never were any issue about and that were con-

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ceded at the beginning?"

I can suggest an answer. I suggest to you that the hope was that you would get ensnared in all of these papers and these Exhibits and these photographs and these bills of lading and this question of what is coming from where and here and there and assume that there was some sort of a massive case built here by the prosecutor as against the defendant.

The case is no stronger than the Webers and Lafferty. And while you are thinking about it and while we are analyzing this proof, all of these things that were conceded, that the prosecutor came in here and proved, I might point out to you from time to time, that all of the things they could have proven, or should have proven, or were readily available, if, in fact, Lafferty and the Webers were telling the truth, that they didn't even bother to prove. And they have no explanation for their failure to do any of this in any way, shape or manner. And I will point out to you some of the missing links in the Government's case as we proceed to analyze the proof.

You had, I believe, on the Government's side,

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a total of some twenty-two witnesses called. The first witness, you will recall, was a gentleman named Kent Johnson. He had to do with the sugar load. You will recall the sugar load is the middle of these three incidents, or the one that occurred on or about the 15th of March. He was an officer from KJ. He talked about some of the Exhibits that are here, and he told us that this first load was not yet routed. Now he told us what route he thought it would go by, and he told us what route he believed would ultimately have been scheduled for the sugar load. But he did tell us that there was no routing yet. Now why is that of any consequence?

Well, you will find out that one of the elements involved in the case is that there be interstate character of the goods in commerce at the time of the theft, that they either have entered the stream of interstate commerce and have been committed to that stream, or that they have already passed across the State line, because we are not here in the Magistrate's Court where one of the Government witnesses here was allowed to plead guilty to some minor charge and given a conditional discharge, whatever that

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meant. We are here in the solemnity and dignity of a United States District Court, which is a Federal Court, and the Government, as the expression goes, seeks to make "a Federal case" out of it. So there are other elements that must be proven here in addition to the theft. And while I suppose we could speculate that maybe one of those elements with respect to that sugar theft might have been met at some time in the future, the fact is that it wasn't yet met, and the sugar load was not yet routed and that the point of origination and that the point of destination of that sugar load was, in fact, two points within the State of New York. So, therefore, the sugar was not yet into interstate commerce, although it was about to enter, but had not yet entered. And the only reason it was about to enter into interstate commerce, because in order to come from one point in New York State to another point in New York State they were going to take this loop around and go through Pennsylvania and New Jersey. And when I was questioning the witnesses, and when he was commenting about it in his summation to you, the prosecutor wanted to know what difference did that

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make whether they went over Route 81 or 81-A or whether that route was even in existence in that period of time, or whether the road was closed or unclosed. And questions of that sort were questions solely directed to deal with this technical element of proof that the prosecutor must meet. And I submit to you that he knows full well that there is confusion in this area. He knows full well that it is his case. He knows full well that it is his duty and his obligation to meet his burden of proof to prove, in fact, that the items in question that were stolen had, in fact, entered the stream of interstate commerce.

The second witness by the Government was a fellow named Roger Prouty. He picked up the sugar, and he told you about the signs that were on the truck at the time he picked it up.

The third witness was Edward Norton, a trooper, and he told you he found one of the trailers.

The fourth witness was a Robert Manzer. He was the terminal manager, and he was up at Port Gibson, and he told you about the sugar and the Beverage trailers.

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Robert Chan was a driver that had to do with the sugar.

Now all of this was an effort to prove something that was totally without contest; the man who loaded the sugar; the man who was about to unload the sugar; the terminal from which it was stolen, and so forth and so on.

The Government then brought in Trooper Alexander. He found one of the trailers.

Then they brought in Rudy Hektor. Rudy Hektor was an interesting witness, I believe. He is the fellow that apparently is Norman Oretskin's right-hand man down in the Binghamton area.

Norman's, we found out, has Norman's Warehouse, Norman's Supermarket and the Polar Foods. Apparently, there is a series of outlets all feeding off of Norman's Warehouse.

You will recall that Mr. Hektor had given a statement sometime shortly after the events in question, to the State Police. Now that is the first clue that you will find to one of the flaws in the Government's case. Because if you think about it, logically and common sensically, that is the way a

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police investigation proceeds. You sit a witness down, you talk to him. You may talk to witnesses separate and apart from each other. But you give them a chance to think about it, but commit them to writing. You put them under oath, either by way of taking stenographic statements from them or by way of having them write out what they claim they saw and heard or by having them say something and then having a stenographer write it down and having them sign it afterwards. So the State Police, at least, start off on the right foot.

You will recall that I pointed out to you in opening, and this is all dealing with the sugar load, I pointed out to you in opening that within a matter of days after the theft that the State Police had gone and gotten a search warrant and raided Norman's premises, and, in fact, recovered a good deal of the sugar that was stolen. So that within days of the delivery of the sugar, the police were aware that it was stolen merchandise, where it was stolen from, where it was coming from, and where it was going to. And isn't it strange that it wound up down there in Binghamton.

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Now logical questions certainly were in order. When did it get here? Who delivered it? Was there a bill of lading for it? Was there a bill of lading signed for it? Who paid for it? Who made the arrangements for it to get here? All of these things were very logical inquiries that should have been and were done.

Now Rudy Hektor says that this sugar load got there, and all he knows is that Norman told him to unload it. Now he is managing this dock for this fellow. He works there some forty hours, in addition to the other job that he has got. And you will recall his testimony to that effect. He is still working there today, as of the time that he testified. Do you believe that he knew only what he said to you occurred with respect to this matter? Now bear in mind this was the sugar load, and nobody else seems to know where the Ragu load came from. The Ragu load came some days previous, almost two weeks previous. And you will recall that a substantial portion of the Ragu load was recovered. But nobody from Norman's knows how that got there, who delivered it, what time it arrived and the means by which it arrived, and not one single word

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of proof from any witness offered by the prosecution to touch upon that area at all.

What happened? Did the entire machinery of the investigative capacity of the State Police and then the Federal Government, the power and majesty of the Federal Government when they took over this investigation, did it all fall flat on its face, that they couldn't find anyone to tell us how that got there?

Well, we know that the State Police questioned Rudy Hektor. Rudy Hektor gave a description at that time of someone. The Government offered Rudy Hektor as their witness. I'm not quite sure. I'm a little confused about what Mr. Baldwin's position is. Did Rudy Hektor tell the truth, or did Rudy Hektor lie? I submit to you that Rudy Hektor lied. I submit to you that the only accurate thing was some description that Rudy Hektor had given to the State Police way back in the beginning before he knew what to lie about and how to lie and who to lie for and who to lie against. And in that he described the person that he saw in a manner inconsistent with the defendant.

You will recall I had him look at the defendant, look at the back of him from the stand, and he claimed

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that from the back you could tell how old a person was. And then he claimed and insisted throughout his testimony that this was the driver. Then the last thing I pointed out in cross-examination was, "Well, you never saw him come out of the cab?"

"No."

"You only saw him at the rear end of the truck?"

"Yes."

"Then how do you know that he was the driver?"

And you will recall a silence that occurred after that question was put to him. And you will recall finally I pushed him and said, "Now, look, if you didn't see him get out of the cab and you didn't see him except at the rear of the truck, you couldn't possibly know he was the driver, could you?"

And he agreed and said, "No," that he couldn't. Yet, throughout this testimony, he refers to this person that he saw as the driver. And you will recall he said he didn't know that the sugar was coming until it got there. Norman Oretskin told him just moments before, and he had no knowledge that the sugar was coming in, no foreknowledge that the sugar was coming in.

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The very next witness for the Government, Kevin Baldwin, calls Mr. Hektor a liar. And I'm sure that young man had no motive. He is just a young boy going to school and working on the dock. I am sure he had no motive to come in and lie. But he said that about a half hour before the truck arrived, he knew it was sugar because Rudy Hektor told him, "A load of sugar is coming in." Now Rudy Hektor said a load was coming, and he didn't know what it was. So Rudy Hektor lied. Rudy knew that it was sugar. Rudy was very well involved in making the arrangements for the whole operation. Yet, Rudy Hektor sits here not charged with anything and has never been charged with anything. He is never going to be charged with anything. Why? So he can come in and make you believe that the defendant was the driver of the vehicle, despite the fact that the description given way back in the beginning was inconsistent.

What gives anyone the right to make that kind of decision? And don't you have a right to take into consideration these types of factors in determining the credibility of the witnesses that the Government offers?

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Norman Oretskin, the owner of Polar Foods, and obviously the center of the disposition point with respect to at least the two loads that were, in fact, delivered, and you know not whether he has been charged, and if he has been charged, what he has been charged with, whether his case is disposed of or if he has a case. You know nothing about Norman Oretskin, yet you are asked to determine the credibility of his right-hand man, Rudy Hektor, without any motivation -- Rudy Hektor, who is still employed by Norman Oretskin at this very moment, and you are asked to determine credibility in these issues when the Government falls flat on its face with respect to making what are sensible explanations for deficiencies in our case.

So they gloss over that and move on, then, to this Trooper Vasisko that seized the stuff at Norman's. We had conceded that he seized the stuff at Norman's. And we had conceded, in fact, the means by which it was going to be shown that it was seized.

Then the Government called the sales representative for SuCrest Order Processing Department. And he told you the whole system of how they run. We've learned an awful lot of things. You learned

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how truck businesses are run, how shipping yards are run, how loading docks are run and how computers are fed and all of this, and none of that has anything, really, to do with the issues involved in the case. So Mr. Aldo Avazzano -- or I believe that was his name, or something like that -- he is the one that told you that the sugar was worth eighteen thousand dollars wholesale.

You will find that the proof required of the Government with respect to these Counts of the Indictment is that the interstate character must be established of the thefts and that they must show the value exceeds a hundred dollars.

And there was never any question about the fact that the sugar and the rest of the Ragu and stuff that was stolen surely exceeded more than a hundred dollars.

Now the Government comes in now, and they say, "Well, Willie Meringola was the brains behind all of this operation." And you remember the sugar was sold. There were two transactions that were closed, so to speak; one was the Ragu transaction that occurred on or about the 1st of March, and the second was the

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sugar transaction that occurred on or about the 15th, 16th of March. And then around the 20th of March of 1975 the sugar and the Ragu were seized. So two transactions went down, so to speak, that were concluded. The Ragu was worth some twelve thousand dollars and the sugar was worth some eighteen thousand dollars, wholesale numbers. That is thirty thousand dollars.

And the arithmetic, as you have it, is that Elwood Weber claims he got -- let's see, he cut the thousand up that he got on the sugar disproportionately, according to him. He got, apparently, the bigger share, six hundred, and his brother got four hundred. And they got five hundred apiece on the Ragu, for a total of two thousand dollars to these fellows. The argument goes, "Aha, there sits the vicious Fagan, Mr. Meringola. He got all the money. He was the bag man. He was the one that came out with the brown paper bag, and he has got all the money in this transaction."

And the difficulty with all of that is that it is not borne out by the proof.

The defendant put in Howard's records to show

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what his condition was economically at the time in question. The defendant showed that he had this line of credit arrangement with Howard's, that he could draw off on advances and that he was on Compensation, that he was on disability at the time, receiving Social Security for being permanently disabled. And I will comment a little later, briefly, on the proof that we brought in so there is no question about any of that. But during the month of March, and when he is the big bag man that is ripping off all this extra bread, extra money, and he is out at Howard's, and he is drawing off draws from Howard's. He got a thousand dollars on one occasion and five hundred on another occasion, and three hundred, as you will recall. You will recall the numbers, that I had the gentleman read them off the records. And the Government wasn't even interested in looking at the pile of records that the man brought in from Howard's. So I got over there at counsel's table, and there is no question that that testimony is accurate, and that it was truthful, and they don't even contest it, and he wouldn't even dare touch upon that subject in his summation to you. The prosecutor is hoping, perhaps, that you will forget

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that.

The proof is that Mr. Meringola is borrowing money, in effect, during the same period of time, from his employer, and money that he is going to have to repay with his own labor and his truck running sometime in the future. And he is supposed to be pocketing all this money from the brown bags. That is inconsistent. If you are ripping off cash behind the scenes, you are not going to be taking your line of credit at the same time with your employer with respect to money that you are going to have to pay back at sometime in the future. But that is what was occurring here.

Now the Government then brought in Terry Weber, and followed by Dennis Pitts. Pitts was the witness, you will recall, who had to do with the two Ragu loads. You will remember these are the two that got abandoned. This was the transaction occurring in April, and this was the transaction that never went any place, because these trucks had all this difficulty. There is a curious thing about Mr. Pitts' testimony. This truck line that he was associated with, they are responsible for the merchandise when it is transhipped

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to them, consigned them to them. They have to pay the losses in the event that there are any. And who would be more critically interested as to whether the load were tampered with or tampered with in any fashion other than to who the person the load was consigned, or his employee or employees.

What did he tell you? He told you that when both loads were recovered, and remember this is the instance when the tractor-trailer, the whole schmiere, was stolen, the rig, the whole rig, the tractor and the trailer, the two of them. He told you that when those loads were recovered, they were recovered intact, that the seals had not been broken.

And there was one other employee, and what motive does Mr. Pitts have to lie about? Absolutely none. They don't know Willie Meringola from a bag of bananas. They have no interest as to the outcome of this case. They were the victims of the thievery in the first instance. Every State Trooper that was involved with those recoveries was unable in any way to refute that testimony. But you see Lafferty and Elwood Weber told you a story about climbing into those trucks, taking out a sample and bringing it over

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to Mr. Meringola to get Mr. Meringola's approval of the merchandise before they stole it.

Now I asked clearly several of the witnesses from Denny's dealing with this subject, and there is no way to get inside of those trucks without breaking the seals. There is no way of seeing inside the trucks without breaking the seals. And everybody agrees that that is the fact. What kind of magic did Lafferty and Elwood accomplish to get inside of these sealed trucks, to come out and deliver these samples across to Mr. Meringola so he could approve what they were going to steal? Why that is nonsense. There never was such approval. There never was such approval necessary. The whole operation was theirs. They knew what they were going to steal from the moment they set out to steal it. They knew where they were going. Isn't it kind of ridiculous that Mr. Meringola has got to tell them to go over to Denny's to steal these two trucks of Ragu and where they have worked there? Elwood Weber worked there, and he knew what they shipped. He knew how they shipped it. He knew that they left the keys in the trucks.

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He tells you he goes there with Lafferty and they never even talk about whether the keys are going to be in the trucks or not when they get there. You remember the cross examination in that area? Now that is nonsense.

Here are two fellows going out, and Lafferty for the first time, to steal a truck, in his whole life, and I said to him, "Did you ask your buddy, Elwood, whether he had any experience doing this kind of thing before?"

And he said, "Oh, no."

"Did you talk to him about how you were going to lift the trucks?"

"No."

"What was the plan? Where were you going with the truck? How were you going to go? What if the keys weren't there? How were you going to start?"

You can't move one of those. You don't even know whether it is locked or not. As you are approaching it, two thieves are going to steal these trucks, and they don't know these things, and they sit here on this witness stand in this courtroom and they tell you that they never even discussed that? That is

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nonsense.

You see what I mean about not leaving your common sense at home in terms of analyzing the truthfulness of witnesses.

Mr. Pitts, Mr. Nowak and Mr. Graham recovered one of these vehicles, assisted, I believe, in the recovery of one of these vehicles. They are all wrong? And the seals were broken because Lafferty says so and because Weber says so and because then that allows them to show a sample to some boss, some non-existent boss? I suggest to you that there never was any need to show any sample, and they didn't break into those trucks as the proof clearly shows.

Then you had the two troopers, the ones that got involved in this "scam," I will call it, around April 20th with Weber and Lafferty. And you recall that it was painful, I'm sure, for the troopers, to have to concede that they got fooled to the extent that they were by Lafferty and Elwood Weber. And we heard a new theory here today by the prosecutor, and it is perhaps a good point to comment on it. And that is because they are only thirty years old, they don't have the experience to engage in these kinds of

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thefts, and because the defendant is older, that therefore that proves somehow or other that he has more contacts and more connections and more ability to get rid of hot stuff than they do. Of course, we know that on a national level, that the crime statistics tell us, unfortunately, it is in the early ages that our young people are commencing to engage in crime. And certainly by thirty, they have got a pretty good background in terms of their living experiences that have exposed them to various forms of criminal activity.

Perhaps another little comment is appropriate at this point. You see, what happened to Willie Meringola here -- and he is fifty-two years old -- he lived a good life all of his life, as his character witnesses that came in attested to, and he has got a good reputation. He has never been arrested. He has never been in trouble, and all of a sudden he just decides to jump over on the other side of the law to accommodate the needs of Elwood Weber, Terry Weber and Lafferty. And then immediately thereafter, jump back on the other side, and now, apparently, did nothing wrong for the rest of that period up until now. That is inconsistent. People don't live that

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way. Life experiences don't occur that way. That is illogical.

I will comment on it just a little bit later and point out to you what really occurred in May when these two, Weber and Lafferty, were arrested and the effort that was made to try to substantiate their story and the effort that was made to try to procure some evidence against this defendant. That totally failed because what the Webers had to say was not truthful. But the two troopers, Graham and Hamilton, told us about this whole business, and it tells us something about the Weber-Lafferty combination. This is a pretty cool combination. These are not just a couple of guys that get talked into doing something against their will because they were short of money. That was a pretty cool way of handling the whole thing, to walk down the road and make a phone call to a mechanic and bluff it right on out all the way through. That was pretty cool. And the troopers tell you something more about the Weber-Lafferty combination than all the words that I could speak, or certainly tell you much more than Weber and Lafferty would ever concede or admit on the stand, because according to them,

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they were a couple of choir boys in their life up to the point of time until this big, bad man tried to talk them into something. And then as soon as they got caught, they became choir boys again, and they are now in here telling the truth. Now that isn't true, and you know that is not true.

Roger Hamilton said something interesting, I thought, though. I would like to point it out to your attention. He said that sometime in May, he went out and he recovered these signs, that some other trooper told him to go there. He doesn't remember who, and he went to locate them where they were thrown in the woods. Somebody told him to get them there. He doesn't remember when he got them. He doesn't remember who told him to go there. He doesn't remember how he got this information about the woods, and both Lafferty and Weber don't know anything about throwing those signs in the woods. Well, somebody knew enough to tell the trooper to go and get those signs in the woods. I wonder how that occurred. I wonder what is missing with respect to the State Police investigation that led them to that point. And I wonder why you are not entitled to know about it.

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Joseph Anderson came in, and he was witness No. 16. He told you that he found this tractor in Weedsport. There wasn't any question about that.

Pat Pratt came in and told us that the telephone records were here. We never challenged the phone company records. As you see, in part, the phone company records support our defense in the case. There was no objection to any of these Exhibits. There was no contest about that.

Then Richard Herman came in, and he was the traffic manager. He had something to do with Ragu or something, and something occurred here. We found out here that the original shipment was consigned to M&M. That is a shipping company that we never heard from before, and I just leave that to you simply because it may have some bearing on the question of whether or not you believe that the Government has proven that these things were consigned to interstate shipment on the interstate aspect of the case, if you ever get to that aspect of it.

William Corcoran came in, and he told us about the finances of Ragu. The next two witnesses were Michael Lafferty and Elwood Weber. And the last witness,

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witness No. 22 for the Government, was Ms. Lewis.

Ms. Lewis was an interesting witness, because she told us what occurred here with respect to this registration, and I will point out to you, hopefully, how her testimony is totally inconsistent with the Government's case, and how her testimony is very beneficial and very helpful to the defense's position.

Now I want to take the Webers and Lafferty and put them altogether and comment on them. As to their credibility, what is their track record? Well, they were arrested, as best as we could tell, sometime in May. They never committed anything to writing or to a sworn statement until November -- all those months. Now that doesn't make any sense. And none of them could tell you what they were facing. When you are facing a charge, one of the things you know is that you're facing X-number of years, and that is the very thing you find out in connection with the charge. You will recall the cross-examination in these areas: "Didn't you know at the time you were dealing what you were facing? Didn't you know you were facing ten years on each of these interstate charges?"



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He said, "No."

"You had a lawyer, and you never talked to the lawyer about that?"

"No."

That doesn't make any sense. So here they are caught, and it takes them all of these months to work out the story that they are going to tell to get themselves out of it. And what happens eventually is that they make a deal, and sometime in November, they come down to Buffalo, New York, and they meet a person named Richard Endler there. And there is some sort of discussion there. And we find out that Richard Endler is a Justice Department attorney in Buffalo. And there is not one word about what kind of a deal was had or made at that time. Suddenly, everybody forgets everything.

Well, I point out the inconsistencies that occurred, for example, in some of the Grand Jury testimony, and the prosecutor has the audacity to stand here and make an argument to you, "Well, you know, they had more time to think about it now, so what they say now is more accurate than what they said then. They had all those months to think about

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it."

If they couldn't get their stories straight over all those months, then they will never get their stories straight. And the reason they can't get their stories straight is because they are lying about the defendant's involvement in it. And they are lying about the defendant's involvement in it because when you want a deal, you've got to have something to sell. The Government is not going to give away, I hope, a person who has committed a crime, unless you can persuade them that you are going to give them somebody else. Now the problem here is that there was no "anybody else." And already, the Government had all of the people that were involved in this thing.

They never chose to pursue Oretskin, apparently. They surely didn't pursue Rudy Hektor down at Norman's where the stuff was recovered.

And involved in it were the Webers, and on the last transaction Weber and Lafferty, and there was no one left to sell. There was no one to give away. There was no one against whom to testify. So, therefore, you would have to be a defendant. Well, it is an awful lot easier to sit in that chair for a brief

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period of time and take some abuse from a defense lawyer like me than it is to sit in that chair and be a defendant and face going to jail for ten years. So Elwood Weber and Terry Weber did exactly that. And the means by which they concocted this whole deal is totally hidden from you and totally gone from their recollection. Isn't that strange? They don't remember anything at all about this. But now they sit up here two and a half years after the fact, never having committed themselves to writing, and they recall exactly, "2:30, 3:00 we were here, 3:30; 4:00 we were there; 4:00 we were at this particular point."

And the prosecutor stands here and says there is the roadmap in the telephone directory and so forth. That is a complete bootstrap operation. And it must be apparent to you that it is a bookstrap operation. The bootstrap is they are pulling themselves up by their own straps. You have to start at the beginning. You don't start at the end. You see how the thing was put together in the first place, if you are analyzing it. You don't come to the conclusion that the defendant is guilty first and then

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look for those things which will support that conclusion. Obviously, you will always find things that might support that conclusion. You start with the proposition, "What does the proof point to?" And you do that by taking a statement first from these people about times, dates, places, and then seeing whether it coincides with the records.

Now what occurred here is that there was proof before that Grand Jury, for example, that the Ragu load was delivered nine or ten o'clock in the morning. That is what Elwood Weber, the only person that testified before the Grand Jury, said then, after months of an opportunity to think about it. Now all of a sudden he comes in here, and there is two things that allow him to change his mind. Well, he remembers this unidentified greasy spoon place in Geneva, and it wasn't open yet, so that is what started this adventure off at six o'clock. We can't even go and check that. It is some unidentified place, and he doesn't recall where it was. It is a greasy spoon place. I suppose there are greasy spoon places all over. And then he recalls that there was some luncheon break up at Norman's, and that is what gives him the other perimeter.

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And the prosecutor argues to you that is what makes him not remember. Now that is a nonsense argument.

First off, they don't have one word of proof from any witness down at Ragu as to when this stuff got there or if the place was even opened during this period of time, or if there was anybody there to have any lunch or anything of that sort at all. And the prosecutor stands here, and he tells us, "We have independently proven that they stripped the signs off the truck, because when the trucks were recovered, the signs were stripped off." Well, certainly, there was never any argument about that. He is trying to create the impression that there is some independent corroboration for what he says. And in all the important areas, there is no independent corroboration.

Why is it important what time the Ragu load arrived there? Well, it is very important, because if, in fact, it was delivered at eight or nine o'clock in the morning, as Elwood Weber first said under oath, and if, in fact, the defendant had been there for at least an hour in the Binghamton area prior to the delivery, which would make it seven or eight o'clock

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in the morning, then it is physically impossible for him to be at his home making calls at seven thirty and eight o'clock down to the Binghamton area. And that is why it is important, because we all know that it takes at least two hours to drive to Binghamton. And he couldn't be in Geneva making the phone calls and also down there receiving the delivery. He couldn't be both places. But you see the Government didn't know precisely how the defense was going to argue. So their effort was to have the testimony be consistent by having Elwood Weber's testimony during this period of time.

Let me stop at this point and say this to you. Surely, if the Government set out to frame the defendant, they could have done a much better job. And I am not claiming here that there is any deviousness on the part of these two gentlemen here prosecuting this defendant. They are doing a job. They are handed an Indictment, and their job is to do the best they can with it. They don't know anything about the proof or how it was developed or what else until they get into the case. And they are doing their job.

The effort here was made by others. The effort

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here was made by others. The effort was made by Terry Weber, Elwood Weber and Michael Lafferty to get together and to concoct a story that would help to get themselves off. And they get caught at it in certain points that I have just pointed out to you. So the solution to the problem is to not bring in this proof or not bring in that proof and to give you a partisan picture. But you have a right, as jurors, to sit there and say, "Now wait a minute. I'm not going to buy that." You can predicate a reasonable doubt just as much on the lack of reasonable proof that you can reasonably expect them to bring in as anyone else. And as soon as you arrive at the point where you have a reasonable doubt, you must acquit the defendant.

Michael Lafferty says to you that sometime around May 8th he was picked up, somewhere in there. He tells you the whole story how this occurred. He tells you that on June 6th, by arrangement with the State Police, he was wired for sound. He tells you he was accompanied by Troopers, and he tells you that he prearranged a meeting with the defendant to talk about this whole thing so that they could get it down

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on record. Michael Lafferty, you will recall, is the one that shows up with the calls from Baton Rouge to the defendant. It is curious, isn't it, that the prosecutor never once asked the defendant, "Did you receive any calls from Lafferty? What were the calls about?" You know what the calls were about. Lafferty took off immediately after the transaction that occurred, where the two trucks had to be abandoned. And we find out then that he catches up with Elwood Weber, who just accidentally happens to be sleeping by the side of the road. Now they don't know where each other is going, and then they happen to run together for some period of time. And we just couldn't get it out of them how far they had to run together. But it appears they ran together several days. And then he is down at Baton Rouge. In the meantime, remember, they know they have been caught. A ticket has been issued to Elwood Weber, and his identification has been procured. His driver's license number has been given up, the whole schmiere. Then they have been caught. Now here they are wiggling yet. And Elwood Weber is going to work out this business with the phony gas receipts, and he is going to lose his

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license, and this is what he is going to do. And Michael Lafferty is down there in Baton Rouge, and he is thinking about, "Boy, who can I dump this baby off on?" So he starts down in Baton Rouge, and he makes a couple of quick calls to the defendant. And then he comes back up here. And the next thing you know, he is over to the defendant's within a matter of days after that, wired for sound by the State Police. He is going to prove that he can ensnare this defendant, and he has got proof of it. He called him down from Baton Rouge.

Now look at the whole story. First off, you see that is why he has got to bring in the shrimp deal and claim the defendant was involved in some shrimp deal.

First off, the defendant had no idea, according to Lafferty's own story, how to reach him, where he was going to be. He said he didn't like this shrimp deal and wasn't going to get involved in it. So I asked him on cross-examination, "Well, the defendant didn't know where you were. What did you call him up for in the first place? Did you call him up to say, 'I decided I don't want that shrimp deal any

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more?'

"If you didn't want the shrimp deal, the best way to avoid the shrimp deal is to not call him at all, because he couldn't reach you."

He calls him twice. He calls him the first time to say, "I am interested in it." And he calls him right back and says, "I am not interested in it."

Do you know why he called him? Well, he called him to establish some claim that he had some contact or connecti. with him."

What does he do then? He goes wired for sound on March 6th with the State Police, and I told you in the opening that we would show you that they failed-- he talked to him for over an hour, and they failed to incriminate the defendant in connection with that call, and the excuse was that the tape was noisy or something or another.

Well, we had an eighteen-minute tape -- that is silent. Now we have a whole hour and twenty-minute tape that goes noisy. And in fact Lafferty was what he claimed he could be and could do, and what he claimed he could do was a very simple thing to do, to run back and get an un-noisy tape or have him call

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on the telephone where they didn't have anything that was going to interfere with that. No, but what happened? Nothing happened.

Lafferty never was able at any time after June 6th to get back in contact with the defendant at all in any way, shape or manner. And curiously enough, when we brought in the defense Exhibit just to show you that sometime in July the State Police are out chasing the defendant and they are searching his premises or his property and nothing taken under a warrant issued July 18, 1975. And there was no explanation by anybody what was going on, who did this, why it was done, and why a month and a half after Elwood Weber and Terry Weber are arrested, they are still trying to find something to connect the defendant to them in some way, and they are failing.

Now we told you what the defendant's condition was. He had a hearing difficulty. He was on Workmen's Compensation, and he had an injury, and he was walking with a crutch or a cane during this period of time. And here is the Exhibit (indicating), and I just simply had the defendant bring the copies of

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the records sent to him. You can look at it. It is dated the 16th of June. It is clear that he has still got a leg brace on as of the 16th of June, according to the doctor's report here.

And it is pretty apparent that he has got a hearing problem, and you couldn't talk to him for very long without knowing he had a hearing problem, if, in fact, you had any real contact with him of any sort. And if you had to talk to him with a tape recorder attached to you, I submit to you, that he would be one of the best subjects to get on tape, because of the way he talks. He talks so loud, and he would be the easiest one to put on tape, if, in fact, he had something incriminatory to say. So there would be no question about that fact. We brought in the receipt as to when he bought his hearing aid, and to show he had a hearing problem back in 1973. And that receipt is in evidence. I can assure you that he didn't go out in 1973 and spend six hundred dollars for two hearing aids so that he could come in court and prove in 1977 that he had a hearing difficulty at a period of time back in 1975. That doesn't make sense. But, in fact, he does have a

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hearing problem, and we have proven it.

And a curious thing occurred when the defense's proof closed. And you will recall the Judge asked, "Any rebuttal?"

And the Government said, "No, none."

Now let me just explain to you what that means. That means that if anything we put in on the defense that the Government could controvert it, anything, then they reopen their case and bring in more proof. They are entitled to that. They are entitled to rebuttal proof. If he didn't have a Workmen's Compensation record in fact, as we said, and if those records, in fact, did not substantiate the proposition that he, in fact, was disabled during this period and, in fact, wore a leg brace, and if they could disprove one bit of it, you would have seen them in here trotting out the proof as soon as I gave up this document, if they hadn't checked it out previous to this. It has got a Workmen's Compensation case number, and it is a simple thing to send an investigator down to look at the record, the whole file. But they are not interested in the whole file. They weren't interested in the whole file from

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Howard's. They were not interested in the whole file from the Workmen's Compensation Board. They are not interested in those. So you can assume what we say is true.

Why is all of that of any consequence? Well, it was very clever for the prosecutor to suggest a different motive for us in proving this. But I prove this for this reason, to show you that Lafferty did not have the kind of contact with the defendant that he claimed he did. Because you will recall I asked Lafferty on the stand, "Now you claim you met him, that you went on this deal with him. You came back and you had these other meetings with him. You claim all of this. Did you notice any physical defects or deformity that he had? Did you notice any problem at all that he had?"

And he said, "No," that he didn't notice any such thing. Surely, he didn't notice because he didn't have that kind of contact with the man. And that proves that he is a liar and that proves that he is trying to set the defendant up. And that surely suggests a reasonable doubt in your mind, if you are a reasonable, logical person, with respect to what

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occurred here.

Now I suppose I have talked too long and not said enough, and there is an awful lot of things to touch upon that I haven't touched upon. I should deal with the proof insofar as it relates to the 15th, 16th, but the prosecutor has done a pretty good job of that. He claims that these calls conclusively prove that the defendant is guilty. I claim that those calls prove that the defendant is innocent.

In any event, if the defendant is the brains or the mastermind of this transaction, is he making all these calls to the Binghamton area on his home telephone number so they can be traced? No, he is not. He came in here, and I'm sure you can appreciate that it wasn't easy to sit up on the stand and admit that he engaged in a marital indiscretion, and I'm sure you have seen his wife here with him, and it wasn't an easy thing to bare his soul and tell you about something that he had done wrong. Because he engaged in a marital indiscretion, he should be not believable? He should be discredited, and he should be convicted of a crime on this kind of proof, where the Government uses the testimony of three people

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that they let go scot-free, in effect, solely because these people claim they could sell them somebody else.

That is what is occurring here, and you will recall Weber and Lafferty, and I asked one of them on the stand, "Is there something funny occurring here?"

He had this big grin on his face, and he was laughing about it all. You bring in a verdict of guilty, and he will be laughing for a long time. All of them will be laughing. They will be laughing just the way they laughed at those troopers. Can you imagine the laugh, while they were scheming up the next plan of how they were going to get out of it. Make no mistake about it. The proof in this case is predicated upon the word of these three birds. Make no mistake about it. And that elaborate story that the prosecutor told you in opening and that he repeated in greater detail in closing, and if you were to remove those portions of it which are predicated upon the word of Weber, Weber and Lafferty, he would have talked to you no more than ten minutes in summation, because he had nothing else to say, except those words which came from their mouths.

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Now if you were going to make your home in California, would you uproot your family and change your job based upon the word of Weber, Weber and Lafferty? Would you, really? And if you feel that you can, that you would and could, then certainly you are more adventuresome than most reasonable people that I have had the privilege of dealing with. And you would be very disappointing to me, because I perceive you as intelligent, rational people. And I believe that if you realize and appreciate that that is truly what you are doing, then you will say to yourself, "I have reasonable doubt."

Now you can hunt through this record, and I can find dozens of reasonable doubts for you, dozens of them. But, really, that is your prerogative and your perspective and your function.

The Mohawk Fruit Stand story is an interesting one. I will just comment on that, and then I will close. There is not one word of proof to support their theory that these trucks ever went to Mohawk Fruit Stand or anything near there. There is nothing to support that. I wonder what happened down in the Binghamton area that nobody remembers. By May of 1975

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the Webers and Lafferty are talking. Now we are only talking about what had occurred in March of the same year. It is only one month intervening, a little more than a month. Nobody could find anybody down there in any way to substantiate their claim that this Mohawk business has anything whatsoever to do with anything. And they keep calling it the Mohawk Fruit Stand.

We read in the phone book page, and the phone book page is in evidence to show you that it is the Mohawk Produce Company, Inc., and in the same building with a different phone number, at 369 Court Street, and not Broad Street, whatever the street is. It is not Route 11, as claimed by one of these witnesses. It is a truck rental outfit. And none of them can remember that there was a truck rental outfit there, when they are sitting out with a couple of hot trucks to make these deliveries. There is nothing to tie them into those premises at all except their word.

And all of these phone calls to Cordi, and who is Cordi? You saw what the prosecutor did. He tried to suggest to you by cross-examining the defendant that Cordi was in jail, and the defendant

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said, "No, I think he is home." Just stop for just a minute and think. If Cordi is in jail, then why doesn't the Government have him in here as a witness to tie this whole thing all up and to solve it all? If he is in jail, he is within their control completely. Why was the Government trying to suggest that Cordi was in jail? A question isn't an answer. There is no proof that Cordi is in jail.

Then look at the other side of it. What is he really trying to do? Mr. Baldwin is trying to get you to violate the rule. And the rule is that a defendant is never required to prove his innocence, that the burden of proof never shifts, that the burden of proving guilt beyond a reasonable doubt is always upon the Government, and that the defendant is never obliged to bring in any witness. That is the rule. So that if Cordi could shed some light upon this matter, it was the Government's burden to bring him in -- not the defendant's.

And if there is anything else in here that is missing that creates a reasonable doubt, it was the Government's burden to bring it in. And you see the whole thing makes sense. There is an enormous

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amount of expense that is involved in bringing people in and witnesses in and organizing all of that. And the Federal Government has all that power and all of that money. And I tell you, no defendant can compete economically with the Federal Government when it comes to prosecution of a case in court. No defendant has that kind of funds, and a citizen should not be required to bring in anything, because they have the burden of bringing in everything. And that is why we have such a rule.

And with that, I will close by simply saying that you can find reason to doubt all over the place in this case. You can find reason to doubt in the character and nature of the witnesses that the Government has produced, and you can find reasonable doubt in the many things that the Government could have and should have proven and that they didn't prove. You can find reasonable doubt in the fact that it took months to put a story together by the Webers and in the manner in which it was put together.

I think you can get the picture yourself. Whatever your verdict is, conscientious and attentive listening to the rules and evaluation of the proof in

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light of the rules is all we ask. Because that is all the defendant is entitled to. We are not entitled to sympathy. We are not entitled to have you consider the serious consequences of a verdict of guilty against this defendant. We don't ask you to, because you are not supposed to concern yourselves with that. I ask you only to honestly, sincerely and sensibly evaluate this proof, and if you can really feel comfortable on the basis of this whole thing and really be satisfied that the defendant is guilty beyond a reasonable doubt, and that the Government has proven it beyond a reasonable doubt, then you should convict him. I submit, however, that if, in fact, you engage in the kind of analysis that we have asked you to, and if, in fact, you listen to the rules, that then we would have no need to concern ourselves about your verdict.

Thank you.

MR. BALDWIN: Ladies and gentlemen, I will be the last one to speak before you finally hear Judge Burke. We have been at this now since ten o'clock this morning. I won't keep you much longer. There is only a couple of points I want to go over.

* * * * *

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And the decision is now yours. What we said has no impact. But make your decision on the evidence beyond a reasonable doubt, and again, I will submit to you that we have proven this case, and we have established the fact that William Meringola is guilty on each Count beyond a reasonable doubt.

I thank you very much for your patience and your attention.

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THE COURT: On March 1, 1975, it was reported by a representative of SJ Trucking to the New York State Police that a trailer containing about 1,650 cases of Ragu spaghetti sauce, valued at approximately \$8,800 had been stolen from the truck terminal on Jefferson Road in Rochester. The Ragu products had been picked up at Ragu Foods in Rochester and were to be delivered to East Farmingdale, New York, on a route that went through Pennsylvania. The empty trailer was later recovered by the New York State Police in the vicinity of Whitney Point, New York.

This theft was committed by Elwood Weber and his brother, Terry Weber, who had been told by

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this defendant, according to the testimony of the Webers, that if they could get a truckload of Ragu products, he, the defendant, could easily arrange to sell it.

Shortly after the theft, the Webers, according to their testimony, upon meeting with Meringola, delivered the Ragu products at the defendant's instructions to Oretskin's Warehouse in Binghamton, New York. After the Ragu was unloaded, according to the Webers, they met again with Meringola, and Meringola paid Elwood Weber, according to him, a thousand dollars in cash.

On March 15th, 1975, Manzer, Traffic Manager of Beverage Transport, reported to the New York State Police that a Beverage Transport trailer containing about \$30,000 worth of sugar had been stolen from the Beverage lot at Port Gibson, New York. The sugar had been shipped from SuCrest Corporation in Brooklyn and was en route to Rochester by way of a route that went through New Jersey and Pennsylvania. I said, "en route to Rochester." It was en route to the person to whom it was consigned, but it had not yet been delivered to the consignee.

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The empty trailer was later recovered by the New York State Police in Binghamton, New York. This sugar had been stolen by Elwood Weber and Terry Weber, according to Weber's testimony, on Meringola's instructions.

Shortly after the theft, Elwood Weber, according to his testimony, contacted Meringola, and Meringola then met the Webers at a prearranged location. According to the Webers, Meringola told them to meet him with the load of sugar at the Mohawk Fruit Stand in Binghamton. Weber testified that Meringola asked them to remain until he could arrange to dispose of the sugar. They refused to remain, and leaving the tractor-trailer there with Meringola, they returned home.

On the morning of March 16th, 1975, a truckload of sugar was delivered to Oretskin's Warehouse in Binghamton. Following this delivery, according to Elwood Weber, he was contacted by Meringola, who said he wanted to meet him in Ithaca, New York. According to Weber, he met with Meringola on March 16 and Meringola paid him \$1,000 in cash. Four days later the State Police searched Oretskin's Warehouse

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and Norman's Supermarket in Binghamton and recovered the stolen Ragu products and the sugar.

On April 26th, 1975, it was reported to the New York State Police that two tractor-trailers loaded with Ragu products valued at about \$25,000 had been stolen from the area of Denny's Trucking at Webscer, New York. These products were to be delivered in Pennsylvania and Maryland. The theft of the two tractor-trailers was performed by Elwood Weber and Michael Lafferty, according to the testimony of Weber and Lafferty. On instructions from the defendant, according to them, they left the tractor at Weedsport, New York. Then Terry Weber, pursuant to a telephone call, picked them up and drove them back home.

After taking the tractor-trailers, Weber and Lafferty drove to Route 31 to a point just east of Lyons, New York. According to their testimony, while stopped at the side of the road, they were approached by two State Troopers conducting a routine check. After the police left, Weber and Lafferty met Meringola, according to the testimony of Lafferty and Weber. They met him, they said, further down the road. They said Meringola told Weber and Lafferty to take the

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rigs to Syracuse where he would meet them. En route, one of the trucks ran out of fuel and while stopped, the troopers again approached them on a routine check, where Weber was issued a summons for failure to have a log book. After the State Troopers left, Weber and Lafferty abandoned the rig that had stopped and they proceeded in the other rig to a prearranged meeting, a spot in Syracuse, according to their testimony. When the defendant failed to arrive, they left this trailer in Syracuse and returned home. They left the tractor at Weedsport. Then Terry Weber, pursuant to a telephone call, picked them up and drove them back home. The State Police recovered both trucks a short time later.

New York State Trooper Norton testified that he recovered the S&J trailer and that it was empty when recovered.

Chan testified that he was the driver of the rig stolen March 16th, 1975, from Denny's area at Webster, New York; that he had picked up the sugar in Brooklyn for delivery in Rochester and that his route of travel was through New Jersey and Maryland.

State Trooper Alexander testified that he

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recovered Chan's stolen tractor-trailer and that it was empty when recovered.

Baldwin, Cohn and Hektor testified that they unloaded a trailer filled with sugar at Oretskin's Warehouse in Binghamton on March 16, 1975.

State Trooper Vasisko testified that he conducted a search of Oretskin's Warehouse and Norman's Supermarket and recovered the stolen sugar and Ragu products. The invoice of the sugar showed its value to be \$18,312.

Pitts, an employee of Ragu, testified as to the theft of the two tractor-trailers loaded with Ragu products. He identified the documents and invoices relating to those loads. Employees of Ragu testified to the documents relating to the Ragu products stolen March 1, 1975, and April 26, 1975, and also as to the value of each shipment and that the Ragu products recovered on March 20, 1975, were those stolen on March 1, 1975.

The defendant testified and denied any contact with Elwood Weber on March 1 in Geneva. He denied meeting with Elwood Weber on March 15th and March 16th. He denied being at Norman's Warehouse on March 16th.

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He denied any connection with the shipment of sugar.
He denied any connection with the April 25th theft.

William J. Meringola is the only one named in the Indictment. The Indictment in this case contains four separate Counts. The first Count charges that between about April 20, 1975, and May 8, 1975, the defendant and Elwood Weber, Terry Weber and Michael Lafferty, named as co-conspirators but not as defendants, did unlawfully and knowingly combine, conspire and agree together and with others unknown to the Grand Jury, to steal goods moving or which were part of an interstate shipment of freight. The Indictment recites that during the said period, the defendant, Meringola, and the said named co-conspirators, the two Webers and Michael Lafferty, did unlawfully steal and carry away from certain motor trucks and other vehicles, with intent to convert to their own use, certain goods and chattels, having a value in excess of one hundred dollars, which were then moving and were a part of and constituted an interstate shipment of freight.

The Indictment sets forth nine separate overt acts, that is, acts which were alleged to be in

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furtherance of the conspiracy.

The first overt act charged in the Indictment is that sometime on or about March 1, 1975, the defendant Meringola had a conversation with Elwood Weber and Terry Weber about stealing a truckload of Ragu spaghetti sauce from Truckstops, Inc., in Rochester.

The second overt act alleges that sometime on or about March 1, 1975, Elwood and Terry Weber stole a tractor-trailer carrying a load of Ragu spaghetti sauce from Truckstops, Inc., in Rochester.

The third overt act alleges that sometime on or about March 1, 1975, the defendant Meringola gave Elwood Weber and Terry Weber about a thousand dollars.

The fourth overt act alleges that sometime on or about March 15, 1975, the defendant Meringola had a conversation with Elwood Weber about stealing a truckload of sugar from the Beverage Transport Company in Port Gibson, New York.

The fifth overt act alleges that sometime on or about March 15, 1975, Elwood and Terry Weber stole a tractor-trailer carrying a load of sugar

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from the Beverage Transport Company in Port Gibson, New York.

The sixth overt act alleges that sometime on or about March 16, 1975, the defendant Meringola gave Elwood Weber approximately one thousand dollars.

The seventh overt act alleges that sometime on or about April 25, 1975, the defendant Meringola had a conversation with Elwood Weber about stealing two tractor-trailer loads of Ragu spaghetti sauce from the Denny Truck Lines in Webster, New York.

The eighth overt act alleges that sometime on or about April 25, 1975, the defendant Meringola drove Elwood Weber and Michael Lafferty in his vehicle to the Denny Truck Lines in Webster, New York.

The ninth overt act alleges that at sometime on or about April 25, 1975, Elwood Weber and Michael Lafferty stole two tractor-trailers carrying loads of Ragu spaghetti sauce from the Denny Truck Lines, Inc., in Webster, New York.

Now I know you are not going to remember the details of these overt acts, so I'm going to let you take the original Indictment, and you will have it before you in the jury room in your deliberations.

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A conspiracy is an agreement between two or more persons to commit an offense against the United States, in this case an agreement to steal from interstate commerce. To constitute the crime of conspiracy and to warrant a finding of guilty against this defendant on the charge of conspiracy, as alleged in Count 1, there must first be established beyond a reasonable doubt that there was an illegal agreement between two or more persons to steal goods from interstate commerce.

Secondly, the proof must establish beyond a reasonable doubt that this defendant participated in the conspiracy with the criminal intention of accomplishing or helping to accomplish thefts from interstate commerce. Participation is willful if done voluntarily and intentionally and with the criminal intention to do what the law forbids, that is, thefts from interstate commerce.

Thirdly, there must be proof that at least one of the overt acts alleged in Count 1 has been proven beyond a reasonable doubt. In Count 1, as I have told you, there are set forth nine separately numbered overt acts, that is, acts performed in

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furtherance of the object of the conspiracy.

In proving the crime of conspiracy, the evidence need not show that the conspirators entered into any express or formal agreement to steal goods from interstate commerce, nor need the evidence establish directly by words spoken or reduced to writing, stating between themselves what the object or purpose of the agreement was. What the evidence must show in order to establish proof that a conspiracy existed is that two or more persons in some way or manner, or through some contrivance, expressly or tacitly, came to a mutual understanding that they would attempt to steal from interstate commerce.

It is not necessary for the Government to establish that this defendant unlawfully agreed with all of the co-conspirators or that this defendant performed all of the acts attributed to the conspiracy. It is sufficient if the proof establishes beyond a reasonable doubt that this defendant, Meringola, conspired with or agreed with at least one other person, or that he knowingly and with criminal intention participated in the conspiracy to steal or attempt to steal goods from interstate commerce, and that at

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least one of the overt acts alleged in the conspiracy was performed by one of the co-conspirators.

The second Count of the Indictment charges that on or about March 1, 1975, the defendant, Merigola, willfully did cause Elwood Weber and Terry Weber, not named herein as defendants, unlawfully to steal and carry away from a certain motor truck or motor vehicle from the Regional Market in Rochester, New York, with intent to convert to his own use, certain goods and chattels, having a value in excess of a hundred dollars and which were then moving and were part of an interstate shipment of freight, namely, about 1,650 cases of Ragu spaghetti sauce shipped from Ragu Foods in Rochester and consigned to White Rose Food Corporation in East Farmingdale, New York, by way of Pennsylvania and New Jersey.

An interstate shipment of freight or goods is one that is designed to be carried across a state line, even though the final destination of the goods is to be in the same state. For instance, goods which were shipped in Rochester, New York, down to East Farmingdale, New York, which is on Long Island, and where the bill of lading shows what the

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route of the shipment was through Pennsylvania and New Jersey, and finally, back into New York. To reach East Farmingdale, New York, that would be a shipment in interstate commerce, because it was designed that the shipment would cross state lines. Another example is where the shipment originates, like the sugar in this case, in Brooklyn, New York, and was routed by the bill of lading through New Jersey and through Pennsylvania, the final destination being Star Markets in Rochester, New York. That would be an interstate shipment, because the shipment was designed to cross state lines. As a matter of fact, it did cross state lines. Of course, a shipment from Rochester destined for points in Pennsylvania or Maryland would be an interstate shipment. A shipment continues to be in interstate commerce and is considered to be moving and as part of a shipment of freight constituting interstate shipment until the goods finally reach their destination where it was intended and where the bill of lading shows they were to be delivered.

For example, the sugar involved in this case was shipped from SuCrest Corporation in Brooklyn and

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was consigned to Star Supermarkets in Rochester, New York, by way of Pennsylvania and New Jersey. The theft of this sugar took place in Webster, New York, before it had reached Star Markets in Rochester; therefore, the sugar shipment was still moving and was part of an interstate shipment of freight.

There is another provision of law that is applicable in this case. That provides that whoever willfully causes an act to be done by another which, if directly performed by him, would be an offense against the United States is punishable as a principal.

Three essential elements are required to be proven beyond a reasonable doubt to warrant a finding of guilty against Meringola on this second Count of this Indictment: (1) The evidence must establish that the 1,650 cases of Ragu spaghetti sauce was stolen and taken from a motor vehicle that constituted part of an interstate shipment, and it was worth more than a hundred dollars; (2) It must be established beyond a reasonable doubt that the performance of the act of stealing the spaghetti sauce must have been done with the intent to convert the goods or property to the use of Meringola, that is, to him, personally,

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or to some person of his choice; (3) The proof must establish beyond a reasonable doubt that Meringola caused or procured the commission of the theft by Elwood and Terry Weber with the intention of procuring the stolen spaghetti sauce for his own use or for the use of another person designated by Meringola for the delivery of the stolen spaghetti sauce.

To establish the interstate character of a shipment, the law provides that the waybill or other document of a shipment shall be prima facie evidence of the place from which and to which the shipment was made. A bill of lading is a document of shipment. As to the March 1 shipment of Ragu spaghetti sauce stolen at Rochester on March 1, 1975, the waybill showed the shipment to be from Rochester through Pennsylvania to East Farmingdale, New York. The bill of lading showed that the route was by way of Pennsylvania. This was an interstate shipment, even though the trailer carrying the spaghetti sauce had not yet driven through Pennsylvania at the time of the theft.

It is not necessary for the Government to show that Meringola actually knew that the stolen spaghetti sauce constituted part of an interstate

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shipment.

Count 3 charges that on or about March 15, 1975, Meringola, the defendant herein, did willfully cause Elwood and Terry Weber, not named in the Indictment as defendants, unlawfully to steal and carry away from a certain motor vehicle from the Beverage Transport Company in Port Gibson, New York, with intent to convert to his own use, certain goods having a value in excess of one hundred dollars, which were then and there moving as and were a part of and constituted an interstate shipment of freight, particularly about forty-two thousand pounds of sugar shipped from SuCrest Corporation, Brooklyn, New York, and consigned to Star Markets in Rochester, New York, by way of Pennsylvania and New Jersey.

To warrant a conviction against Meringola, it must first be established that the theft of the sugar from the Beverage Transport Company in Port Gibson, New York, was a theft of sugar which was then part of an interstate shipment, and that it had a value in excess of one hundred dollars.

Secondly, the evidence must establish beyond a reasonable doubt that the performance of the act

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of stealing was done with the intention to convert the sugar to the use of Meringola or to a person designated by Meringola where the sugar was to be delivered.

Thirdly, it must be established beyond a reasonable doubt that Meringola willfully caused the theft to be accomplished by Elwood and Terry Weber.

The fourth Count of the Indictment charges that on or about April 25, 1975, Meringola did willfully cause Elwood Weber and Michael Lafferty to steal and carry away from the motor vehicles of Denny Truck Lines in Webster, New York, with the intent to convert to his own use, 1,712 cases of Ragu spaghetti sauce being shipped from Ragu Foods in Rochester and consigned to Food Fair Stores in Baltimore, Maryland, the spaghetti sauce having a value in excess of one hundred dollars; and approximately 1,229 cases of spaghetti sauce shipped from Ragu Foods in Rochester and consigned to Thriftway Company in King of Prussia, Pennsylvania; and about one hundred cases of Ragu spaghetti sauce shipped from Ragu Foods in Rochester and consigned to ARA Food Service Corporation in Philadelphia, Pennsylvania.

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To warrant a conviction against Meringola on Count 4, the evidence must establish beyond a reasonable doubt that the spaghetti sauce stolen from Denny Truck Lines in Webster, New York, then constituted part of an interstate shipment of goods, and that it had a value of more than one hundred dollars.

Secondly, the evidence must establish beyond a reasonable doubt that the act of stealing must have been done with the intent to convert the stolen spaghetti sauce to the use of Meringola or to a person designated by Meringola to receive delivery of the spaghetti sauce.

Thirdly, the evidence must establish beyond a reasonable doubt that Meringola caused or procured the theft of the spaghetti sauce from Denny Truck Lines in Webster, New York, with the intention of converting the spaghetti sauce to his own use or to a person designated by him for delivery of the spaghetti sauce.

Counsel for the defendant in opening the case referred to the fact that the Government spent all this time in proving the theft of the shipments

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and the value of the shipments, and they devoted all this time wholly unnecessarily, because that was not in dispute.

The defendant in this case pleaded not guilty. That necessitated a trial. Now at that trial, the Government had the burden to establish the necessary elements of the case beyond a reasonable doubt, as I have already pointed out those elements to you.

The Government can use proof, or they can use a stipulation or agreement between the defendant and the Government. There was no such stipulation or agreement with the Government in this case as to the theft of these, or as to the value of the interstate shipments, or that they were, in fact, interstate shipments. The Government had to prove it. That wasn't an unnecessary gesture. It was caused by the fact that the defendant pleaded not guilty. Now there could have been a stipulation or an agreement between the Government and the defendant. There was none, so the Government had no alternative but to prove the theft, the interstate character, and the value of the shipment.

Now if the Government hadn't done that, in

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spite of the fact that the defendant had said those things were never in dispute, this Court would have been faced with a motion by the defendant that there wasn't the necessary proof in the case to establish the thefts on the interstate character of them. So that business about this being an idle gesture to spend all this time on the proof, that is just not so.

The defendant made reference in his summation, as I understood it to be, that Norman Oretskin was the only one that could have told you what happened at the warehouse on March 16th in Binghamton. During the course of this trial, I think he meant to infer that Oretskin wasn't called as a witness, and he wasn't called because the Government knew that his testimony would have been unfavorable. I wouldn't speak of this except for the fact that this is part of this case, and the defendant's attorney was part of it. In the early part of this case, they came into my chambers, counsel for Oretskin and the Government and the defendant's counsel was also there. Now the Government at that time came in with the lawyer for Oretskin, and the lawyer announced

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to me, and counsel knew it, too -- counsel for the defendant knew that if Oretskin was called as a witness, he would take the Fifth Amendment. And the Government was apprehensive that unless they called Oretskin as a witness, that the defendant might ask for an instruction that because the Government didn't call Oretskin as a witness, that Oretskin's testimony would have been unfavorable to the Government.

The defendant has a right to ask the Court to make certain charges. And I got such a request from the defendant. And it was solely within the prosecutor's power to call for this man Oretskin as a witness. Since the prosecution did not call this witness, you may presume that this testimony would have been unfavorable to the prosecution. Now this is in spite of the fact that I told counsel at that conference in chambers, along with the Government's attorney, and also the attorney for Oretskin, that I would not make such a charge to the jury in view of the fact of those happenings that I have pointed out.

Another reference was made to the fact that

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Lafferty had a body transmitter and had conversations. And there was some reference to the fact that there was no evidence of that tape in this case. That tape was played before me, and I was the one who determined that that tape was inaudible and was not understandable, and I would not permit it in evidence. That is the Court's responsibility, and that happened during the course of this trial, and incidentally, at that hearing the defendant's counsel himself also took the position that the tape was inaudible and not understandable.

During the course of these instructions, I have given you my version of the evidence in the case, based upon my rough notes made during the trial and upon my recollection of the evidence. I have not attempted to cover all the evidence in the case, but you should consider all the evidence. I want to point out to you that you are not at all bound by my version or my recollection and recital of the evidence. If your version or your recollection of the evidence differs from mine, have no hesitation in rejecting my version. If your version differs from mine, rely upon your own version and

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upon your own recollection of the evidence.

An Indictment is nothing more than a formal accusation against the defendant. It is no evidence whatsoever of guilt and is not to be considered as any indication of guilt. It is a method under our system of law by which a defendant is formally and exactly notified of the charges against him so that he may definitely know what the charges are and may be able to formulate his defense against the charges.

Now I am going to allow you to take the original Indictment with you into the jury room. Each Count of the Indictment is a separate charge of a violation of law. And each Count must be considered separately and a conclusion of guilt or innocence be made by you on each separate Count.

The Government has the burden of establishing each and every specific element of each of the charges contained in the Indictment. I have given you those elements. Each element must be established beyond a reasonable doubt to warrant a finding of guilty. The burden of establishing guilt always remains with the Government. There never comes a time in a case when the burden shifts to the defendant

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to prove his innocence.

A reasonable doubt means a reasonable or substantial doubt arising from the evidence, or lack of evidence, as to any of the elements which go to make up a charge. It is a doubt that is based on reason or logic as distinguished from a doubt based on some emotion, such as a whim, a fancy, caprice, or even a so-called hunch. To establish the elements of each Count charged means to establish them to a reasonable and moral certainty. The defendant in this case is presumed to be innocent, and that presumption of innocence remains with him throughout the entire case and can only be overcome by evidence which establishes guilt beyond a reasonable doubt.

You as jurors are the sole judges of the credibility of the witnesses. You as jurors are the sole judges of the facts in the case. It is the duty of the Court to instruct you what the law is so that you may apply the law to the facts as you find them. You may not invade the province of the Court to determine what the law is, and the Court may not invade the province of the jury as to what

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the facts are.

Some of the witnesses in the case have an interest in the outcome of the case; some a direct interest and some an indirect interest. But whether the interest is direct or indirect, it is incumbent upon the jury to determine whether you think the witness has let that interest influence his or her testimony in favor of one side or the other. If so, the testimony should be discounted accordingly. If you conclude that some witnesses have testified falsely and have done so intentionally, you have the right to reject the testimony of that witness entirely, or you can reject that part which you believe to be false and retain the balance. That is entirely up to you.

Now I want to call your attention to one fact. The Webers and Lafferty, by their own testimony, were accomplices of this defendant, by their own testimony, and there is no question about that. They were partners in crime, and, therefore, I want to point out that doesn't make their testimony not receivable in evidence. But having been received in evidence, I want to point out to you that they were

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accomplices, and it is up to the jury to determine whether they have a motive in testifying as they did in this case. And "accomplice testimony" should be viewed with suspicion. That means you should be alert to the fact that it is accomplice testimony and should be subjected to the utmost caution in weighing that testimony as to each particular Count.

The form of your verdict should be either guilty or not guilty. No explanation of your verdict is required and no explanation of your verdict is appropriate.

The defendant has sworn some witnesses who have testified to the good reputation in the community of the defendant, for honesty and integrity. This is commonly called character testimony. Evidence of good character, when considered in connection with the other testimony in the case, might conceivably give rise to a reasonable doubt. The circumstances might be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it, the other evidence would be convincing.

A finding of guilty may not be based on

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speculation or conjecture. It may only be based on the proof in the case beyond a reasonable doubt of each and every essential element of each of the crimes charged.

To be effective as a verdict, your verdict as to each Count must be unanimous. If you are not able to agree unanimously on all the Counts, but you can agree on some of the Counts, report that to the Court. As to each Count, your verdict should be guilty or not guilty. No explanation of your verdict is required or appropriate. Your verdict on each of the Counts of the Indictment need not necessarily be the same. You might conceivably find the defendant guilty or not guilty on some Counts and not upon some of the other Counts.

You may take all the Exhibits with you into the jury room along with the original Indictment, which I am handing to the Clerk now.

Now this has been a long trial, and because of the fact it has been a long trial, I am going to keep the alternates. We will furnish a place for you until the jury has reached a verdict. It is conceivable that something might happen to one of the

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jurors even during deliberations. We will furnish a place for you and furnish you something to read. I know it will be boresome, but there is no other alternative.

Any requests or exceptions?

MR. BOREANAZ: Yes. I would like to have an opportunity to put this on the record and in the jury's absence.

MR. BALDWIN: I have one request. The Government requests to charge No. 12.

THE COURT: I have already charged that, but I will charge it anyway. The request is:

"As I will point out later in my charges, the Government need not prove that the defendant knew that the goods were moving in interstate commerce in order to prove the defendant guilty of the substantive charges. That being true, the Government need not prove that the defendant knew the goods were moving in interstate commerce in order to prove the defendant guilty of conspiracy."

I have already charged that, but I charged it again.

MR. BALDWIN: Thank you, Your Honor.

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(Two Marshals were duly sworn.)

THE COURT: You can take the jury and the alternates out to lunch at this time.

(At 1:47 p.m., the jury was escorted to lunch, after which they returned to the jury room and commenced their deliberations.)

(At 2:00 p.m., in the robing room; counsel present.)

MR. BOREANAZ: Your Honor, I would respectfully except to that portion of Your Honor's charge wherein you advised the jury there had been a hearing in chambers with respect to the appearance of Norman Oretskin and that at that time counsel for the defendant had been advised that the witness would, in fact, exercise his Fifth Amendment privilege and that the Court had instructed at that time that you would not charge that the witness was in the control of the Government. I agree that there was such a conference, so that there be no question about that. I believe that was on the record, and I agree that counsel was advised that the witness would exercise his Fifth Amendment privilege. I also believe, however, that the argument made by myself to the jury did not open

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the door to the disclosure of that circumstance, because I never charged the Government with an obligation to have called him, nor did I directly or indirectly infer that they had such an obligation. My argument was directed to the other witness that had appeared on behalf of the Government that was associated with Norman's Warehouse, and that being the witness who was the manager. And since counsel did not open the door in argument to the jury, in summation, to that aspect of the thing, I respectfully submit that it was very prejudicial to the defense to imply to the jury that counsel had made some devious position or taken a devious position in their presence.

Now, also I take the same position, Your Honor, with respect to that portion of Your Honor's charge which dealt with the audibility hearing. And I submit, Your Honor, that once again you have put counsel in the position as to create the impression with the jury that counsel engaged in some devious posture. I agree I took the position that that tape, as it was produced here in court, was inaudible. I advised the jury in argumentation that they claimed it was inaudible. So while I was making my summation to the jury, I in

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no way opened the door to the comments that the Court made to the jury which, in effect, once again implied that counsel had taken a devious position. I submit that the argument that I made was proper. And I submit for the Court to then interject itself into the partisanship of the argument as between the defendant and the Government was done so in such a manner as to the great detriment of this defendant. And I submit that the damage is irreparable as far as we are concerned. So on behalf of the defendant on the ground that the Court has interjected itself with respect to these two issues in its charge to the jury, I respectfully move the declaration of a mistrial.

THE COURT: I deny the motion. Exception is noted. I don't agree with it at all.

MR. BOREANAZ: Also, Your Honor, I ask the Court to instruct the jury, then, that the Government refused to grant immunity to Norman Oretskin and that they could have gotten his testimony, had they chosen to grant him immunity.

THE COURT: I decline to so charge.

MR. BOREANAZ: I respectfully except with respect to my requests to charge, which were submitted

JURY CHARGE OF THE COURT.

to Your Honor yesterday.

THE COURT: I ruled on each and every one of them, and it is in the record. They are marked.

MR. BOREANAZ: There is nothing in the record now.

THE COURT: Yes, there is. I am making those marks on there as part of the case. That is a filed paper. I ruled on each one of those elements in your presence yesterday, and I marked it in writing, and that will be in evidence in the case.

MR. BOREANAZ: All right. I respectfully except to Your Honor's charge as to 15, 16 and 17, pursuant to my requests. I respectfully except to that.

T. COURT: Exception is noted.

MR. BOREANAZ: That is all I have, Your Honor.

(At 5:05 p.m., in the robing room;
counsel present.)

MR. BOREANAZ: It is my understanding that the jury has sent a note to the Court.

THE COURT: I will state exactly what the note says: "May we please have the testimony of the Grand Jury of Elwood Weber and Michael Lafferty."

JURY CHARGE OF THE COURT.

That is the note. And I asked the Clerk to show this to the lawyers to see if it was in evidence. And you both sent word back that it was not in evidence. So I propose to send a note to the jury, which I showed to you, and it reads: "Not in evidence." And it is signed "H.P.B., U.S.D.J."

I submit under the circumstances that the Court should make an effort to respond to what is an obvious attempt by the jury to determine how to evaluate the usage of the prior inconsistent testimony, if any, that they may find with respect to the credibility of these witnesses. So I request that the Court return the jury to the courtroom and advise them that counsel was entitled to use the prior sworn testimony of these witnesses for the purpose of impeachment, and although the Exhibits themselves were not permitted into evidence, that they may use such prior inconsistencies as they find to exist from the testimony as elicited in evaluating the credibility of these witnesses.

THE COURT: I decline to do so. That note was to me. The only reason that you saw that note is because I sent word to the Clerk to find out from

JURY CHARGE OF THE COURT.

the lawyers if it was in evidence. I did find that out. That note wasn't to the lawyers in this case. That was to me. I decline to act as counsel has suggested.

MR. BOREANAZ: I respectfully except, Your Honor.

(At 5:55 p.m., the jury returned to the courtroom.)

THE COURT: I have a note from the jury, and it reads as follows:

"Can we have the names that go with the following phone numbers: Interlaken, New York, 607-532-4398; Geneva, New York, 315-789-8983."

I'm going to ask counsel for both sides to confer together and see if you can agree upon an answer to that. If you can, let me know, and I will give the jury your answer. You may confer now. I will ask the jury to stay here until they have.

(Discussion off the record.)

MR. BOREANAZ: The telephone number 607-532-4398, Interlaken, was registered at that time to Elwood Weber. The telephone number, Area Code 315-789-8983, Geneva, is registered to Ray Knittle

* * * * *

RULE 30, FEDERAL RULES OF CRIMINAL PROCEDURE.

RULE 30. Instructions

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party out of the presence of the jury.

As amended Feb. 28, 1966, eff. July 1, 1966.



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Room 1702 U.S. Court House
Foley Square
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Re: United States of America v. William J. Meringola

~~Under No.~~ Docket No. T-7572

Dear Sir:

Enclosed please find copies of the above entitled for filing as follows:

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[10] Briefs and Appendix

~~XXXXX Original Record enclosed~~

~~XXXXX Original Record to come under separate cover~~

Very truly yours

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Everett J. Rea

cc: John F. Humann, Esq.

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September 26, 1977

Re: United States of America v. William J. Meringola

State of New York)
County of Onondaga) ss.:
City of Syracuse)

EVERETT J. REA,

Being duly sworn, deposes and says: That he is associated with Spaulding Law
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That at the request of **John F. Humann,**

Attorney(~~3~~) for **Appellant** William J. Meringola,

two (2)

(~~3~~) He personally served ~~three (3)~~ copies of the printed ☐ Record ☒ Brief ☐ Appendix
of the above entitled case addressed to:

JOHN J. KLEIN, ESQ.
Attorney At Law
U.S. Dept. of Justice
Appellate Section
Washington, D.C. 20530

☒ By depositing true copies of the same securely wrapped in a postpaid wrapper in a
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Everett J. Rea
EVERETT J. REA

Sworn to before me this 26th day of September, 1977.

Donald C. Quinn
Notary Public
Commissioner of Deeds

cc: John F. Humann, Esq.

